

# Reasonableness and “the Reasonable Person” in the Chinese Context

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Legal argument in English pervasively relies on the term *reasonable*, which carries with it a framework of evaluation that plays an important part in English discourse. The *reasonable person* standard plays a central role in law. This paper examines *reasonableness* and constructs *the reasonable person* in the Chinese context. A case in point is the role public opinions played in the court’s alteration of a verdict from life-long to a five-year imprisonment for a 23-year-old worker who illegally withdrew 170,000 Chinese *yuan* with his own debit card from an ATM. Clearly, it is necessary to construct an objective standard of the hypothetical ordinary person. This construction accords with the people-centeredness approach in China’s scientific development concept and its goal in building a harmonious society.

*Keywords:* reasonableness, reasonable person, rule of law, Chinese civil law

## 1 Introduction

Legal argument in English pervasively relies on the term “reasonable” (Fletcher, 1996), which carries with it a framework of evaluation that plays an important part in English discourse (Wierzbicka, 2006). The “reasonable person” standard plays a central role in law, especially in tort law, criminal law and administrative law (Moran, 2003). China has been undergoing great transformations ever since the open-up to the world in the early eighties of the 20<sup>th</sup> century, and at the same time it has witnessed the construction of many laws, including tort law, law of

knowledge/intellectual property, and property law, to name just a few, along with administrative law and regulations. One of the biggest changes is the adoption of “presumption of innocence” which replaces “presumption of guilt” in the Chinese Law which produced many cases of injustice.

China, a nation generally known as being governed by the rule of man, and is now striving for the rule of law as a popular slogan goes “we must observe the rule of law and get rid of the rule of man” (Xiao, 2008). The present situation seems to be that the rule of law and the rule of man exist side by side in China. Nevertheless, the rule of law calls for the adoption of legal concepts such as reasonable person.

Judges play a vital role in the legal practice and subjective judgment standard is the mainstream criterion in measuring any case following the Soviet Marxist ideology in China (Guo, 2009). Judges have formulated their own mode of judgment based on their experience in the job, which is to settle lawsuits according to standards required by law, according to common sense and the way of the world. No unified method or procedure has been formulated. There is no explicit mention of *reasonable person* or saying of *bonus pater familias* in the Chinese law proper. However, since the start of the new century, the academia and public media are paying more and more attention to the discussion of reasonable person standard, with some researchers even calling for the application of such an objective standard in the Chinese law system (e.g., Mei, 2006, 2010; Fan & Zhang, 2003). According to Lin (2000), what is the “reasonable person” in the Anglo-American law is called “bonus keeper” (*shanliang guanli ren*) in the civil law of Chinese Taipei.

The words *reasonable* and *unreasonable* carry with them a framework of evaluation that plays an important part in Anglo-/English discourse. This framework of evaluation is language and culture-specific (Wierzbicka, 2006:104). The question that arises first is whether there is such a framework of evaluation in the Chinese language and culture, especially in contemporary China. To answer this question we have to look at the distinction of the reasonable and the rational in English and Chinese. We find that there is confusion or mixture of ‘reasonable person’ and ‘rational person’ in the Chinese legal literature which coincidentally matches the evolution of

reasonableness in the English language and culture. Since the Chinese law system has borrowed many legal concepts from both the common law and the civil law, and there are legal concepts related to reasonableness and *reasonable person* such as *reasonable doubt* and *reasonable care* in local legislations and the national basic criteria of vocational morals of judges, it is highly recommended that reasonable person standard be adopted in the Chinese Law.

## **2 The Concept of Reasonableness and the Standard of Reasonable Person**

Reasonableness, as a concept employed in modern legal systems, is “both elusive and multifaceted” (Saltman, 1991:107). Being culture-specific and historically shaped, and as a key Anglo value, reasonableness can be understood as “a core set of concepts concretizing into a series of practical and normative requisites that form the basis for judging decisions and actions of legal relevance” (Bongiovanni, et al, 2009: xi). According to Bongiovanni et al (2009), it serves a wide range of functions yielding multifaceted criteria whose content varies from case to case. Reasonableness is different from instrumental rationality because reasonableness (value-oriented) is concerned with the right and good whereas rationality (goal-oriented) is concerned with efficiency (Alexy, 2009:5-6). Further, reasonableness draws more on economic, political, moral considerations, social practices and norms, and on the other side, rationality draws more on the correctness of reasoning. As Wierzbicka puts it, “one can be rational or irrational on one’s own, but one is usually being reasonable or unreasonable when one is interacting with other people” (2006:106).

The fictional reasonable person is not without problems and suspicion and criticism are from feminists, critical race theorists and others in terms of political correctness and in the difficulties inherent in fashioning a legal standard by reference to some idealized person. Herbert’s (1935) fictional case, *Fardell v Pott*, is the first mockery of it in that the court is faced with the puzzle of applying the reasonable man standard to a woman. We believe the objective standard of reasonable person is philosophically sound and pragmatic.

Sadurski (2009) argues that reasonableness in both law and political theory at the level of their deep justification appeals to liberal, egalitarian, and consensus-oriented values. In law, the concept of reasonableness, when used in a “strong sense”, is inherently tied up with proportionality, also with the test of necessity, and thus is a guarantee of minimal restriction to constitutional rights compatible to the attainment of a given purpose. Compared with other approaches, it is more transparent when it comes to revealing to the public all the ingredients of the judicial calculus, and most importantly, it reduces the sense of defeat for the losing party. In political philosophy, the notion of reasonableness applies to the determination of the standards of justifications for authoritative decisions so that they can be considered legitimate, i.e., calling for respect even from those subjected to them who do not agree with them on merits. This idea is attractive in that it combines two popular traditions of democratic theory: those of social contract and those of deliberative democracy (Sadurski, 2009).

### **3 Reasonableness vs rationality**

The distinction between the concepts “rational” and “reasonable” has attracted a lot of attention in the field of philosophy in general and the philosophy of justice in particular. Sibley’s (1953) seminal paper “the rational versus the reasonable” connects the distinction closely with the idea of cooperation among equals and is of central importance in understanding the structure of justice as fairness (Rawls, 2001:7). According to Wierzbicka (2006), the sense of the word *reasonable* that Rawls (2001) has primarily in mind is that which has its opposite in *unreasonable*, i.e., the sense that bears an implication of not wanting too much (from other people). It is precisely this sense that is linked with the idea of “cooperation between equals” and with the notion of fair. This sense implies a whole ideology of social interaction. In social interactions, firstly we should appeal to other people’s thinking as well as their will. Secondly, it is good to limit our claims to other people’s goodwill and not to request too much. Thirdly, in uttering our wishes, it is good to take into account of other people’s point of view. It is good to act in this way not only on moral grounds but also because this is

what reason dictates. Here reason and morality converge in the ideal of cooperation with other people (Wierzbicka, 2006).

According to von Wright (1993:173), rationality is “goal-oriented”, whereas reasonableness, by contrast, is “value-oriented”. According to Rawls (1993: 48 f.), the distinction can be traced back to Kant’s distinction between hypothetical and categorical imperatives (Kant, 1964: 82). Thanks to this reference to Kant, it is clear that the decisive point of the reasonable is its moral nature. Rawls puts this in the following way: “merely rational agents lack a sense of justice” (1992: 52), so reasonable people are moral agents. Besides rationality and morality, Sartor’s (2009) sufficientist reasonableness includes a third aspect, consonance, which requires that in order for a determination to be reasonable with regard to a certain context (culture or form of life), it must also be *consonant* (or at least not completely dissonant) with the ideas prevailing in that context, and in particular, with the norms that are practiced in that context. In this study, we adopt Sartor’s (2009) sufficientist reasonableness because it accords with the current people-oriented spirit reflected in China’s scientific development concept and China’s goal of building a harmonious society. We will return to this later.

#### **4 Reasonableness vs ties of friendship as a framework of evaluation in the Chinese Language and Culture**

While reasonableness is a framework of evaluation in the Anglo culture, its Chinese counterpart is *qing* and *li*, ‘ties of friendship’ and ‘being able to stand to sense’, or ‘being reasonable’. The Chinese framework of evaluation has a sense of human touch, or ties of friendship as the following fixed expressions show:

- 人情味 [ren qing wei]: human touch/interest, the milk of human kindness
- 有人情味 [you ren qing wei]: have human appeal; show empathy
- 没有人情味 [mei you ren qing wei]: impersonal, not exceptionally human

- 讲人情 [jiang ren qing]: respect of the person/set great store by friendship
- 不近人情 [bu jin ren qing]: be unreasonable
- 人之常情 [ren zhi chang qing]: normal practice (in human relations), human nature
- 情理之中 [qing li zhi zhong]: reasonable and/or understandable
- 情有可原 [qing you ke yuan]: excusable and/or understandable

*A New Century Chinese-English Dictionary (Hui, 2003) & Dict.cn*

In a society ruled by law, ties of friendship play less and less role in adjusting the human relations. There is a tendency in the Chinese culture to adopt the concept of reasonableness as a framework of evaluation. *He li bu he li* and *jiang bu jiang dao li* both meaning ‘being reasonable or unreasonable’ are two most used evaluation expressions. The idioms or phrases abound in this framework.

*Expressions of Being Reasonable:*

- 合情合理 [he qing he li]: be fair and reasonable; stand to sense
- 合乎情理 [he hu qing li]: reasonable; sensible
- 通情达理 [tong qing da li]: show/have good sense; be understanding and reasonable
- 知情达理 [zhi qing da li]: reasonable, sensible
- 言之成理 [yan zhi cheng li]: sound reasonable
- 言之有理 [yan zhi you li]: speak in a rational/convincing way

*A New Century Chinese-English Dictionary (Hui, 2003) & Dict.cn*

*Expressions of Being Unreasonable:*

- 不合情理 [bu he qing li]: unkind and irrational; unreasonable
- 不通情理 [bu tong qing li]: unreasonable; impervious to reason
- 不可理喻 [bu ke li yu]: will not listen to reason
- 情理难容 [qing li nan rong]: contrary to reason or common sense; incompatible with the accepted code of human conduct
- 讲道理 [jiang dao li]: bring out the reasons
- 不讲道理 [bu jiang dao li]: unreasonable; be unreasonable

*A New Century Chinese-English Dictionary (Hui, 2003) & Dict.cn*

Although the concept of ‘a reasonable person’ plays a key role in British and British-derived laws, it does not mean it only belongs to the language of law and is not used or relied on ordinary language. On the contrary, as the corpora such as Cobuild demonstrate, it is also widely used in ordinary English (Wierzbicka, 2006). To see how the Chinese equivalent of *reasonable person*, *heli ren* and related terms are used in Chinese language, we conducted a search in Beijing University Corpus of Modern Chinese (1.06GB), and the results are reported in Table 1.

Table 1: Results from Beijing University Corpus of Modern Chinese

Chinese character	[pinyin]	English equivalent	Result
合理人	[heli ren]	reasonable person	0
理性人	[lixing ren]	rational person	27
合理 (的) 时间	[heli (de) shijian]	reasonable time	22
合理 (的) 怀疑	[heli (de) huaiyi]	reasonable doubt (suspicion)	9
合理 (的) 结果	[heli (de) jieguo]	reasonable result(s)	16
合理 (的) 限制	[heli (de) xianzhi]	reasonable limit(-ation)	26
合理 (的) 机会	[heli (de) jihui]	reasonable chance/opportunity	5
合理 (的) 期望	[heli (de) qidai]	reasonable expectation(s)	6
合理 (的) 希望	[heli (de) xiwang]	reasonable hope	9
合理 (的) 注意	[heli (de) zhuyi]	reasonable care/attention	0
合理的力量	[heli de liliang]	reasonable force	6

Note: The English equivalents are translated by Zhang & Ma.

As Table 1 shows, there is no result about *he li ren*, but there are about 27 results about *li xing ren* in Beijing University Corpus of Modern Chinese. Most common phrases containing *reasonable* used in legal and ordinary situations such as *reasonable doubt*, *reasonable force*, and *reasonable time* have their equivalents in the Chinese corpus with the exception of *reasonable care*. In the subsequent sections, we turn to how these legal terms are used in the Chinese legal context.

## 5 The Reasonable Person Standard in Chinese Legal Literature

China has long been a nation ruled by the rule of man through virtuous leaders like Bao Zheng, a statesman in North Song Dynasty, who is

known for his integrity, justice, and refusal to bend to an unlawful power. With its modernization and globalization, China is now striving for being a nation ruled by the rule of law. At present, it seems that the rule of law and the rule of man exist side by side in China. As a popular slogan goes we must follow/observe the rule of law and get rid of the rule of man. The rule of law calls for the legal concepts such as reasonable person (Xiao, 2008).

In the new millennium, there is more and more mention of ‘reasonable person’ and ‘rational person’ in the Chinese legal literature. As a matter of fact, there is more mention of ‘rational person’ (*li xing ren*) than ‘reasonable person’ (*he li ren*) partly because *li xing ren* (rational person) is already adopted as a term in economics and partly because it is a common collocation. By contrast, *he li ren* (reasonable person) is a loan term exclusively in the legal field. We also conducted a keyword and title search in China National Knowledge Infrastructure (CNKI) and the search of *li xing ren* as keyword produced 698 results, as title 87 results while the search of *he li ren* as keyword yielded 70 results and as title 5 results. The use of *li xing ren* in CNKI covers a wide range of fields: economics, law, education, ethics, public health, and etc.

In the Chinese legal literature, there is a confusion or mixture of ‘reasonable person’ and ‘rational person’, which coincidentally matches the evolution of reasonableness in the English language and culture. According to Wierzbicka (2006), both *rational* and *reasonable* have their starting point in the concept of “reason,” but two centuries ago (if not earlier), their paths parted, and *reasonable* went its own way. The emergence of the modern concept of ‘a reasonable man’ is causally linked with the British Enlightenment. The Age of Enlightenment was seen as the Age of Reason, but the reason cherished by most influential figures of the British Enlightenment was not “pure reason.” It was a reason focused on empirical reality, on “facts,” on “common sense,” and on probabilistic thinking. *Reasonable* refers inherently to a potential discussion or debate with other people and implies an expectation that if they considered the matter, they would think the same. *Rational*, by contrast, has nothing to do with other people and refers precisely to a way of thinking (Wierzbicka, 2006). For example, In Liu (2001), both *rational person* and *li xing ren* are used in the



article. However, according to Liu, “rational man” is universally used as the criterion for the judgment of errors and to ascertain whether or not the delinquent part has the prediction to the damage because of breaking contract. But it is rarely discussed in the law field. “Rational man” should be the person who can bear the civil liability independently. This criterion is not only good for overcoming shortcomings caused by the subjective standards, but also good for realizing equality before the law and the value of justice. It also embodies the essential needs of legal liability. Liu is certainly talking about *reasonable person*.

Other examples of the confusion of *reasonable person* and *rational person* in the Chinese legal literature abound. In Y. Li’s (2005) article, “person in civil law and its rational basis”, the author uses *reason* for *li xing*, but, *rational person* for *li xing ren*. Xiong & Zhang (2009) make an economic analysis regarding the reasonable person standard as the accident negligence responsibility determination standard. However, they use ‘reasonable person’ only for their English title and abstract, for the Chinese title and article use *li xing ren* instead of *he li ren*.

However, there are legal scholars, though few in number, who use *reasonable person* correctly and consistently. For instance, in Mei’s (2006) applying the reasonable person standard in civil adjudication and Mei’s (2010) reasonable person standard in authorizing criteria of civil law, the author has consistently used *he li ren* and called for the application and adoption of reasonable person standard in the Chinese civil law.

## 6 Legal Concepts related to reasonableness in Chinese Context

Although the reasonable person standard does not appear in the Chinese law, related legal concepts such as *reasonable doubt* and *reasonable care* do exist in some local legislation.

### 6.1 Accountability based on reasonable doubt

The term *heli de huaiyi* “reasonable doubt” actually appears three times in the 2001 version of *Basic Standards of the People’s Republic of China on Professional Judges* issued by the Supreme People’s Court on Oct 18, 2001, specifically in the 1<sup>st</sup>, the 11<sup>th</sup> and the 45<sup>th</sup> Articles. For

example, the 11<sup>th</sup> Article stipulates that “judges should keep from engaging in activities outside one’s position what may cause the public to have reasonable doubt about his or her judicial justice, honesty and uprightness” (translated by Zhang & Ma). The promulgation of this regulation was seen as a sign of progress for the judiciary. However, in the 2010 revised version issued by the Supreme People’s Court on December 6, 2010, there is no mention of such concept as “reasonable doubt”. It is hard for us to figure out the underlying reasons for this. Anyway, the absence of this important concept in the new law tells us that the revised version needs further revision. In connection to this, the incident of judge impeachment in Panshi City, Jilin Province attracted a widespread attention and it is known as the first case of judge impeachment in China (Shen, 2003; Q. Li, 2003). On February 24, 2003, the court of Panshi City unveiled *Interim Provisions in Impeaching Law-enforcement Officials of No-confidence*, which was later renamed *Interim Provisions in Implementing Accountability Based on Reasonable Doubt to Law Enforcement Officials*. In the mid of May, 2003, Xuebin Wang, Deputy Chief Judge of the Civil Division of this court was impeached and was relieved of his post for his attending a dinner entertained by the defendant’s daughter, during the litigation time the case was heard and he was the hearing judge.

Although the impeachment of the judge is unconstitutional, accountability based on reasonable doubt in the place of impeachment provisions is well-received by the public (Cheng, 2003; Chen, 2007). Accountability based on reasonable doubt does have an isomorphic relation with presumption of guilt logically, but they play different roles in achieving their goals in different areas, namely, civil law and criminal law. Accountability based on reasonable doubt aims to enhance the professionalism and trustworthiness of judges, and it is exercised in judges’ professional integrity. If accountability based on reasonable doubt is applied to criminal cases with presumption of guilt, it will result in infringement of the rights of citizens. If presumption of innocence is applied to professional ethics, it will extinguish last traces of judges’ trustworthiness.

Cao (2004) reported that the forth draft of *Shenzhen’s Municipal Bylaw of Precautions against Post Crime* has clear stipulations of media supervision: journalists enjoy the right to know, right of having

*reasonable doubt*, right to criticize, right to liberty and security of person.

Innovation of “right of reasonable doubt” complies with the notion of running state affairs according to law: exercise of public power should stand the test of reasonable doubt. There is a belief in practice that the performance of public power players is above outsiders’ suspicion, and it runs on self-verification. Such a belief is a self-deception. An ironic case is *Zen Jincheng & Zhang Kuntong*, former chiefs of Henan provincial transportation bureau, who had sent letters written in their own blood to take pledge in their innocence to the Provincial Party Committee before they were proved guilty of corruption.

## 6.2 Obligations of Reasonable Care in the Administrative Law

Obligations of reasonable care in administrative law were stressed in the Work Report of Shandong High People’s Court by the Court’s President Ying Zhongxian who mentioned a special case, *U.S Pan Asian Educational Foundation v. Qingdao Educational Bureau* over the change of the legal representative of Qingdao International School. The plaintiff, U.S Pan Asian Education Foundation, filed a suit against Qingdao Educational Bureau for its improper registration of the replacement of the legal representative of the School and requested the court of the first instance to relinquish the administrative act of the bureau. The High Court after its careful review of the case, corrected the verdict of the Intermediate Court and affirmed the decision of the first trial, i.e., relinquishing the administrative act of the defendant and thus protected the lawful rights and interests of the foreign investors.

The story behind the case is that the Agency for U.S Pan Asian Education Foundation decided to replace the former president of the School with Guo Zongming who is actually not a director of U.S Pan Asian Education Foundation and therefore not qualified to be elected as the Chairman of the Board. The right to apply for the replacement of the legal representative of the School still lies in the School not the Agency. The bureau did not abide by the principle of prudent and careful check and examination, failed to fulfill its duty of reasonable care and attention, and as a result approved the illegal change of the legal representative of the School. The local educational bureau should

have reviewed the record of the Charter of the school, and found out the flaws. Thus it committed an administrative mistake in its administrative check and approval. Therefore there are legal flaws in the administrative act of the educational bureau's confirmation of the change of the president of the School.

### 6.3 The Reasonable Person Standard and Chinese Legal Practice

The reasonable person standard accords with the people-centeredness in the background of China's Scientific Development Concept and China's goal of building a harmonious society. Law roots itself in society. The construction of rule of law is conditioned by the character of society (Qiu, 2004). Compared with the ideal type of "rural China" proposed by Fei (1984), Chinese villages are witnessing major changes in terms of the nature of farmers' values, behavioral logic and linkage patterns. Villages today can no longer be adequately described by concepts such as "rural China" and "acquaintance society"; and there is a corresponding change in the setting and logic of rural legal practice (Dong, Chen & Nie, 2008). By defining the social character of the present transferring China, Qiu (2004) puts forward the basic category "Commercial-agrestic China". Not only "discourse disorder" but also "structural disorder" has been observed in rural areas; this means that endogenous village forces are unable to keep order effectively. In a rural society that is taking on more and more of the features of modernity, national law plays an increasingly indispensable role in maintaining social order, and promoting a harmonious society. With an ever-increasing number of farmers moving to cities in the industrialization period, China is undergoing great transformations into a stranger society. Reasonableness and reasonable person concepts would benefit China's transformation into a nation ruled by law.

A case in point is the role public opinion played in the court's alteration of a verdict from life-long to a five-year imprisonment for a 23-year-old young worker Xu Ting who illegally withdrew 170,000 Chinese *yuan* with his own debit card from an ATM in Guangzhou. Xu was charged with theft of financial institution and the first-instant court gave him a life-long-imprisonment sentence. It is reported that more than 90% public opinion was sympathetic with the defendant and felt that the life-long-imprisonment decision of the first trial was unfair and

unreasonable. The dispute is over whether ATM is financial institution, whether there is a difference between stealing money from a typically financial institution and illegal withdrawal from ATM. It would be doubtful that any reasonable person would think that ATM is a financial institution. Furthermore, there is a big difference between an illegal withdrawal from ATM and stealing or robbing a financial institution. Xu's case is an example in point that ordinary people, in this case, the public can think well and their thinking is essentially good and trustworthy. Had the first court applied the reasonable person standard instead of mechanical adjudication, as they did in their hearing *de novo*, the law would have served its purpose of maintaining the social justice and stability.

The impact of Xu's case is enormous. Ms Du, a laid-off female worker, who went to withdraw 3,000 *yuan* in a bank in Nanjing, was given 30,000 *yuan* instead. She found the extra 27,000 *yuan* shortly when she went shopping. She immediately went back to the bank to return the money, but was kept from entering the bank because the bank was about to close. Fearing being put into prison, she left the 27,000 *yuan* in a local police station. Finding out the shortage of 27,000 *yuan*, the bank sent people to Ms Du's residence and the police station to collect the money. They explained the error was due to improper handling by a new cashier.

A similar case was reported by Eric Kelsey from Reuters On July 7, 2011. German authorities are investigating a soldier who turned in safety deposit boxes containing more than 1 million Euros (938.3 thousand pounds) in cash two days after the boxes fell off a truck. Prosecutors are investigating whether to bring charges of attempted embezzlement against the soldier. The general comment on the possible charge following the report is that the soldier should be given a medal, not charged.

In the Chinese law system, it is of necessity to adopt the concept of reasonable person. It is democratic, as well as pragmatic because most ordinary people are "reasonable people" and their thinking is essentially good and trustworthy, for in most situations they will be able to think well enough for practical purposes (Wierzbicka, 2006). The ability to frame any general concept as 'fictional', 'mythical' or a 'construct' is a fundamental feature of 'reflexive modernity' (Beck et

al., 2003). It is through ‘the mediation of the imaginary that we are able to conceive of the real in the first place’ (Gaonkar, 2002:7). Most of all it accords with China’s people-centred approach in building a harmonious society.

## **7 Conclusion**

We highly recommend that the reasonable person standard be adopted in the Chinese Law on the basis that the Chinese law system has borrowed many legal concepts from both the common law and the civil law, and there are legal concepts related to reasonableness and reasonable person such as *reasonable doubt* and *reasonable care* in local legislations and *Basic Standards of the People’s Republic of China on Professional Judges*.

In the Chinese law system, it is of necessity to adopt the concept of reasonable person. In China, we practice the people’s jury system in the trial courts. The Chinese jurors are a group of people selected by the court who generally hold important posts or positions in society. Their jobs are actually different from those of Common law. They are asked to hear the case in the court, but do not take part in any decision-making of the case. However, their signature is required on the verdict of the court before it can be taken into effect. At present, the legal reform on this practice in some provinces is being undertaken, e.g. Shaanxi Province is now experimenting a jury system similar to that of common law. Jurors are chosen from all walks of life, and the jury is composed of ordinary people, teachers, clerks, workers, etc. The legal concept of reasonable person is expected to guide the communication between legal profession and ordinary people, so all the jurors are armed with this objective standard.

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