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CHINA REEXAMINED: THE WORST OFFENDER OR A STRONG CONTENDER?

*Yang Wang**

CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST? By *Randall Peerenboom*. New York: Oxford University Press. 2007. Pp xvi, 416. \$35.

INTRODUCTION

I am confused. I thought I knew China well. After all, I was born in China and lived there until I left my parents to come to the United States for college. My memories of nearly twenty years of living in China and the periodic visits since I left are mostly happy. My parents are middle-income state employees who lived in a government-issued, Soviet-style apartment for almost their entire adult lives. Recently, like many other middle-class Chinese families, they bought a small townhouse in a newly developed suburban community and rented out the old apartment in the city to supplement their income. They no longer ride bicycles to work. Instead they bought a small, underpowered Toyota for the now-longer daily commute and baby it like any sixteen-year-old American does her first car. And like many young Americans, my sixty-year-old father is thinking about getting a bigger car with more horsepower and perhaps upgrading to a single-family house at some later time. My mother, on the other hand, seems less enthusiastic about yet more upgrades and more excited about getting to know her new neighbors. My parents are optimistic about their future and looking forward to their retirement. They, and many ordinary Chinese citizens like them, seem happy.

But almost a decade of living in the United States has exposed me to another China that I hardly recognize. According to the U.S. government, the Chinese people are living under a repressive authoritarian regime with a deplorable human rights record.¹ We Chinese have a government that routinely commits serious abuses against its own citizens, and due to the tight control the Chinese Communist Party (“CCP”) has on state organs and the military, there is very little that the oppressed masses can do about it.² Even

* J.D. candidate, May 2008. I thank Professor Nicholas Howson for advising me on this Notice and Hyland Hunt for her excellent edits and suggestions on previous drafts. Special thanks to my parents, who have applied a good mix of offender and contender models at home over the years; to Anna, who will hopefully grow up to think the same; and to Ping.

1. BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2006 (2007), <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm> (last visited Nov. 29, 2007).

2. *Id.*

the American media, typically skeptical of the U.S. government, join in condemning China for human rights violations and social and economic problems, and paint an overwhelmingly negative image of China.³

Thus, like many other Chinese students studying in the United States, I am torn between the conflicting views. Like my American classmates in law school, I study and support freedom, democracy, the rule of law, and human rights. But I also resent the implied suggestion that my fellow Chinese citizens—resilient, content, and optimistic as many of them seem—are ignorant about their own servitude and must somehow be enlightened and freed. I struggle to reconcile my two competing perceptions of China: one, acquired from having grown up there and from having witnessed its transformation, that China is finally headed in the right direction, despite its earlier missteps, and has much to contribute to the world community; the other, acquired during my stay here in the United States, that China is a stubborn authoritarian state with little regard for its own citizens or the established international order that is headed on a collision course with the United States and the West. Are we Chinese blissfully blind to our own perils? Should we fight for human rights, the rule of law, and democracy—and if so, when and how? Is China the worst offender or a strong contender?

These are the questions that Professor Randall Peerenboom⁴ sets out to answer from an American legal scholar's perspective in *China Modernizes: Threat to the West or Model for the Rest*. Peerenboom advances three main arguments in *China Modernizes*.⁵ First, to more accurately assess China's performance in its quest for modernization, one must "plac[e] China within a broader comparative context" (p. 10). Through a careful analysis of empirical data, Peerenboom observes that China outperforms many other countries at a similar income level on almost all key indicators of well-being and human rights, with the sole exception of civil and political rights (p. 20). Second, the United States employs a double standard towards China on human rights issues, and this double standard is likely due to the international human rights regime's unjustified bias against nondemocracies and an undue emphasis on civil and political rights over social and economic rights (Chapter Five). Third, China may be following the same path as other East

3. One commentator makes the following observation with respect to social and economic rights:

China is generally on a mini-negative image roll in the Western media. The current litany emphasizes the modest size of the Chinese economy (less than a quarter of Japan's) as opposed to its astonishing rapid growth, the suffocating pollution of its cities as opposed to all the wealth-enhancing urbanization, and the 800 or 900 million relatively impoverished Chinese in the country as opposed to the rise of an unprecedented large middle class nearing 300 million in size (more than the entire population of the United States).

Tom Plate, *The U.S. Media's Love/Hate Relationship with China*, ASIAMEDIA, Dec. 8, 2004, <http://www.asiamedia.ucla.edu/article.asp?parentid=18198> (last visited Nov. 29, 2007).

4. Professor of Law, University of California, Los Angeles.

5. To give a sense of his perspective, Peerenboom describes himself as "a communitarian-leaning pragmatist who emphasizes economic development and the elimination of poverty as essential for human dignity." P. ix.

Asian countries, such as Japan and South Korea—China may eventually democratize, but not before it has reached a higher income level, and certainly not at the cost of jeopardizing social stability and economic growth (Chapters Seven through Nine).⁶

Peerenboom's comparative approach to evaluating China's human rights record exemplifies what I call the "contender" approach to human rights enforcement. Conceptualizing the more traditional approach to enforcement as the "offender" model, this Notice argues that the offender model should only be used to enforce *jus cogens* norms and that the overuse of the offender model enables the double standard in the enforcement of human rights that Peerenboom identifies. Part I first applauds Peerenboom's approach and his conclusion that China compares remarkably well with other countries in the same income class on most key indicators of human rights. Part I then develops the key principles of the offender and contender models. Drawing from the analogy between the offender model and the domestic criminal justice system, Part I concludes by suggesting that the offender model should be limited to only those well-defined and widely accepted core human rights, leaving other rights to be examined under the contender model. Part II shifts the focus to China's main accuser in the human rights context, the United States. Extending the analogy between the offender model and the criminal justice system, this Part supplies additional doctrinal support for Peerenboom's contention that the United States should abandon its double standard towards China and further suggests that the overbroad offender model currently used by the international human rights regime may have caused or exacerbated the problem of selective enforcement.

A few words on the purpose and relevance of this Notice may be in order here. As a Chinese who has spent a third of his life in the United States and appreciates all the hospitality, generosity, and education he has received during his stay in this country, I am perhaps among the most pro-American—and the most receptive to the liberal version of human rights, rule-of-law, and democracy ideals—of my generation. Yet as will be apparent from this Notice, I also question the desirability and feasibility of democracy in China in the immediate future, dispute that the liberal conception of human rights should be the universal standard, and remain critical of the continued hegemony and arrogance practiced by the U.S. government in international affairs. Thus, although the American political and human rights hardliners may be quick to dismiss Peerenboom's position as too sympathetic to the Chinese government and accuse him of being an "apologist[] for dictators,"⁷ I remain skeptical of their cause and approach. I also wonder

6. This Notice focuses on the first two themes of *China Modernizes*. For recent literature on China's future as a democratic state, see, for example, KELLE S. TSAI, *CAPITALISM WITHOUT DEMOCRACY* (2007), which argues that privatization will not lead to democratization in China, and *WHAT IF CHINA DOESN'T DEMOCRATIZE?* (Edward Friedman & Barrett L. McCormick eds., 2000), which features a collection of essays by Sinologists on both sides of the debate.

7. Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about "Values in Asia,"* 14 *IND. INT'L & COMP. L. REV.* 1, 1 (2003).

whether these hardliners will have an even more difficult time persuading the Chinese leadership or proving their case to the typical Chinese citizen.

I. ASSESSING CHINA'S HUMAN RIGHTS PERFORMANCE

Far from being a CCP apologist, Peerenboom does not gloss over China's problems; he spends a good bit of his book detailing the deficiencies in China's human rights record and its legal system.⁸ But *China Modernizes* goes beyond the conventional criticism leveled against China by human rights activists and the U.S. government. Peerenboom critically analyzes some of these common accusations and argues that while some of them are justified, others may be exaggerated and unwarranted, especially when China's performance is compared to similar countries. Sections I.A and I.B discuss Peerenboom's assessment of China's human rights record in the stand-alone and comparative contexts respectively. Section I.C proposes two models, offender and contender, to characterize the dichotomous approaches to China's human rights performance and makes a preliminary inquiry into the proper balance between the two.

A. Critiquing the Critics: The Stand-Alone Context

From the start, Peerenboom takes a stance decidedly different from the prevailing skeptics of China's human rights policy. Instead of simply dismissing China's official statements as government propaganda, he contends that while these government statements and reports tend to be selective and biased, they nevertheless present one side of the picture (p. 82). The main tenets of China's official response to Western criticism on China's human rights record, Peerenboom argues, are normatively and factually defensible. For example, the government's position that interpretation and implementation of human rights depends on local circumstances is "unimpeachable as a descriptive claim and as a legal claim" (p. 85). Its insistence on prioritizing subsistence and stability over civil and political rights has popular support among Chinese citizens and among the majority of citizens in other developing countries (pp. 85–86). In addition, its objection to the interference in its domestic affairs and sovereignty in the name of human rights—often by countries with severe human rights problems of their own—is not without foundation and is shared by other countries (pp. 86–90).

As Peerenboom proceeds to examine China's human rights record in detail, he groups his analysis into two broad categories—physical integrity and civil and political rights (Chapter Three) and social and economic rights (Chapter Four)—that loosely track the first- and second-generation rights, respectively, under Karel Vašák's theory of three generations of human

8. For example, Peerenboom is particularly critical of the wide gap between China's official policy and actual practice with respect to the protection of personal-integrity rights and civil and political rights, pp. 90–126, and China's failing attempt to reform its criminal justice system, pp. 195–204.

rights.⁹ With respect to first-generation human rights, Peerenboom contends that China does not deserve the dismal rating it consistently receives on physical integrity (p. 83), although its low score on civil and political rights, reflected in its placement in the bottom tenth percentile of the World Bank's voice-and-accountability index, is accurate (p. 83). With respect to second-generation human rights, Peerenboom argues that in light of its limited resources, China does relatively well in most areas of social and economic rights (pp. 158–62): its standard of living has dramatically improved over the past decades (pp. 129–32), access to health care has broadened (p. 132), and the illiteracy rate has decreased (p. 133). Moreover, despite China's dramatic increase in wealth, its level of income disparity has remained virtually constant from 1995 to 2002 (p. 131). The "stunning rise in wealth that has lifted over 150 million people out of poverty" is remarkable in itself (p. 129), and even more so in the comparative context: Peerenboom notes that China outperforms India, another fast-growing, low-income country, on all measures of social and economic rights, including infant mortality, life expectancy, and primary-school enrollment (p. 130).

B. Comparing the Comparables: The Broader Comparative Context

The comparison between China and India is one example of the "broader comparative context" Peerenboom advocates in *China Modernizes*. In this "broader comparative context," he argues, one should compare China's human rights record primarily with those of countries at a similar income level.¹⁰ Instead of comparing China's human rights record against "idealized accounts of good governance and rule of law that no country lives up to, or the normatively inspiring yet frequently violated idealistic standards championed by human rights activists"—which, as Peerenboom puts it, is akin to "compar[ing] apples and oranges"—*China Modernizes* focuses on "demonstrat[ing] how China does relative to the actual performance of other countries" (p. 10). Peerenboom argues that when comparing China with the actual performance of other countries, the proper benchmark is not "the record and performance of much wealthier countries" but rather that of "the average country in its income class" (p. 11). This is because "[p]erformance on human rights standards, including measures of civil and political rights, and other indicia of human well-being, is highly correlated with wealth"—a

9. For an overview of the commonly accepted theory of three generations of human rights, see Burns H. Weston, *Human Rights: Concept and Content*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 17, 21–23 (Richard Pierre Claude & Burns H. Weston eds., 3d ed. 2006).

10. P. 10. The World Bank puts China in the lower-middle-income class. The World Bank, Country Groups, <http://go.worldbank.org/D7SN0B8YU0> (last visited Nov. 29, 2007) [hereinafter The World Bank, Country Groups]. This class includes countries with a Gross National Income ("GNI") per capita between \$906 and \$3,595. The World Bank, Country Classification, <http://go.worldbank.org/K2CKM78CC0> (last visited Nov. 29, 2007). Other Asian countries in this class include Indonesia, Iran, and the Philippines. The World Bank, Country Groups, *supra*.

claim that Peerenboom convincingly establishes with empirical analysis.¹¹ Peerenboom concludes, “As countries become wealthier, they generally protect all rights better” (p. 40).

When examined in this new comparative context, China is a strong performer in its own income class in most areas of human rights, the rule of law, and quality of governance. Peerenboom observes, “China’s performance across a range of variables . . . is on the whole demonstrably superior to the performance of most African, Middle Eastern, and Latin American countries with which it is often lumped as a problem case” (p. 20). China’s performance on economic rights is “particularly [impressive] in light of the disappointing performance of so many other developing countries” (p. 19). On most major indicators of human rights and well-being (except civil and political rights), “China outperforms the average country in its income class” (p. 20). China’s quality of governance, as reflected in the World Bank good-governance indicators, is superior to, or at least as good as, the average country in its income class, including many democracies (p. 184).

In addition to a country’s income level, there is a second dimension in Peerenboom’s comparative context: cultural and regional influences. While income level alone does not explain China’s low score on civil and political rights, cultural and regional influences help account for this anomaly. After comparing the East Asian region with other countries on a variety of rights indicators, Peerenboom concludes that “East Asian countries with a Confucian influence, even if democratic, tend to do poorly relative to income level on civil and political rights” (p. 43). Countries such as Japan, Singapore, and Vietnam “all underperform relative to income” (p. 43). China, where Confucianism originated and maintains a strong influence, is no exception. Viewed in this cultural-regional comparative context, China’s poor performance on civil and political rights becomes more explainable, if not excusable.

C. Offender or Contender: The Competing Approaches

Peerenboom’s generally positive assessment of China’s human rights performance in the comparative context and the prevailing criticism leveled against China represent two competing approaches in measuring a country’s performance on human rights issues: one is what I will call the offender

11. Pp. 39–40. There is, however, a minor flaw in Peerenboom’s statistical analysis showing the positive correlation between wealth and social and economic rights as measured by the Human Development Index (HDI). Pp. 39–40, 129–30. The HDI is a composite index constructed from the average of three indices: life expectancy index, education index, and GDP per capita index. See UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2006, at 393–94 (2006). Because GDP per capita is a component of HDI, the high correlation ($r=.92$) between HDI and GDP per capita is a result of the presence of GDP per capita on both sides of the regression equation and is likely an overestimate of the true value. It may therefore be more appropriate to exclude the GDP component from HDI in computing the correlation. By my calculations, based on the same set of UNDP data used by Peerenboom, the correlation between the life expectancy index and GDP per capita is .76; the correlation between the education index and GDP per capita is .77. Both are slightly lower than the correlation between HDI and GDP that Peerenboom derives (.92), though they still reveal a strongly positive correlation between wealth and social and economic rights and support his conclusion.

model, used by the U.S. government and Western human rights activists; the other is the contender model, embodied in Peerenboom's "broader comparative context"¹² and advocated by *China Modernizes*.

The offender model compares a country's human rights performance with a fixed set of rules to determine whether the rules have been violated. This approach is analogous to the criminal justice system, which mandates a common set of minimum standards of conduct for all members of society and punishes those who fail to adhere to them. Many hallmarks of the domestic criminal justice system are also present in today's international human rights regime: international human rights are often regarded as "standards of conduct" for states with respect to their own citizens;¹³ states that fall short of these standards will receive various "punishments," typically by way of an annual "name and shame" process in the United Nations Human Rights Commission or, in limited circumstances, economic sanctions.¹⁴

The contender model differs from the offender model in two significant ways. First, it does not prescribe a fixed set of standards of conduct that all must meet or be punished. Rather, it compares the performance of each participant against that of the others and rewards the superior performer. Second, it recognizes that performance is often critically affected by the characteristics of the contestants and accommodates this fact by grouping and comparing contestants only with others of similar attributes. An analogy for this approach is any kind of competitive sport in which contestants compete against others of similar age, gender, or weight and are rewarded for superior performance. Peerenboom's "broader comparative context," under which one assesses a country's human rights performance relative to that of countries at similar income levels, falls squarely within the contender model.

The offender–contender framework is critical to a proper understanding of Peerenboom's position and his arguments in *China Modernizes*. Without appreciating Peerenboom's implicit argument that China is better treated as a contender rather than an offender, a believer of the offender model will likely find Peerenboom's "broader comparative context" argument utterly unconvincing. Those who reject the contender model might ask why China's human rights record should be explainable or even excusable by its status as a low-income country or its cultural heritage. The analogy between the

12. P. 10; see also *supra* Section I.B.

13. See, e.g., Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, 212 (2001) ("The European human rights system . . . is designed to hold member states to particular standards of conduct in their treatment of individuals.").

14. Of the two kinds of sanctions, public-shaming sanctions appear to be the more effective tool, as governments will often go to great lengths to avoid a condemnatory conclusion in the Human Rights Commission. See Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 511 (2004). For the inefficacy of economic sanctions, see, for example, Christopher Wall, *Human Rights and Economic Sanctions: The New Imperialism*, 22 FORDHAM INT'L L.J. 577 (1998).

offender model and the criminal justice system appears to support their position: crime, like human rights violations, is also highly correlated with the offender's income,¹⁵ but in the criminal justice system, wealth, or the lack thereof, is almost never an excuse for crime.¹⁶ Just like the lack of any other means of income is never an excuse for one to engage in theft, robbery, or prostitution, a country's low-income status does not make human rights violations against its own citizens any less reprehensible or punishable. Similarly, an offender's cultural, regional, and political background, under this view, should have little bearing on the determination of its guilt or punishment because by definition, the minimum standards of conduct, both in the criminal-justice context and in the international human rights context, reflect universal values and must be observed by all members of the community regardless of their personal beliefs or practices.¹⁷ Therefore, if Peerenboom's argument is only read to mean that China's human rights violations are no worse than many other low-income countries or countries with similar cultural backgrounds, appeals to proponents of the offender model are likely to fall on deaf ears.

Peerenboom's "broader comparative context" argument should be more appropriately understood, first and foremost, as a challenge to the international human rights regime's overreliance on the offender model. By criticizing the use of idealized accounts of human rights or the record of wealthier countries as the universal benchmark for human rights protection, Peerenboom questions whether the standards of conduct currently in use under the offender model, supposedly minimal in theory, have been stretched unrealistically broadly in practice. Using standard criminal law terminology, this amounts to a challenge to overcriminalization in the realm of international conduct regulation. This challenge to overcriminalization forms the basis of both Peerenboom's argument that China's human rights record is more properly assessed in comparison with countries at similar income levels and his conclusion that China is a strong contender in its own right when viewed in this "broader comparative context."

Thus the issue is not whether China is more properly examined in a stand-alone context or compared to countries of similar income. Rather, the debate is more properly understood as one between the offender model and the contender model. Both models have normative appeal and the ideal approach to dealing with human rights issues should probably be a combination of both. At one end of the spectrum lie certain violations of core human rights, such as genocide and torture, that offend the basic hu-

15. See, e.g., Tomislav V. Kovandzic et al., *The Structural Covariates of Urban Homicide: Reassessing the Impact of Income Inequality and Poverty in the Post-Reagan Era*, 36 *CRIMINOLOGY* 569, 570-77 (1998) (summarizing the wealth of theoretical and empirical literature on the correlation between crime and poverty and income inequality).

16. J. ANGELO CORLETT, *RESPONSIBILITY AND PUNISHMENT* 24 (3d ed. 2006) ("[P]overty alone is no excuse, legally speaking, for crime.").

17. Cf. President's Remarks in Kyoto, Japan, 41 *WEEKLY COMP. PRES. DOC.* 1724, 1729 (Nov. 16, 2005) ("In the 21st century, freedom is an Asian value because it is a universal value. It is freedom that enables the citizens of Asia to live lives of dignity.").

man dignity universally cherished by all nations and should be examined under the offender model. Toward the other end of the spectrum, however, are rights where performance is highly correlated with a country's wealth and affected by its cultural heritage and political institutions.¹⁸ Performance in these areas of human rights should be examined under the contender model, which compares nations of comparable abilities and rewards leaders in each group instead of punishing or shaming those who fall behind.

In theory, it is easy to understand that at some point along the axis of conduct regulation, the offender model stops being a justifiable tool to deter violations and the contender model begins to be the preferred method to encourage compliance. But in practice it is difficult to determine where the stick should end and where the carrot should begin. The prevailing criticism that portrays China as the worst offender of human rights presupposes a broad definition of the core rights; it applies the offender model to almost all rights ranging from civil and political rights to social and economic rights and seeks to stigmatize those whose conduct falls short of "the normatively inspiring yet frequently violated idealistic standards" (p. 10). Peerenboom, on the other hand, would reject this approach and argue for a less inclusive composition of the core rights, leaving many rights to be examined under the contender model.

A detailed discussion of where the line should lie is beyond the scope of this Notice, but it is helpful to briefly note that the standards of conduct used under the offender model should be clearly established and universally accepted in international law for it to have any meaningful application.¹⁹ Just as criminal statutes should not penalize all conduct falling short of saintliness, the offender model cannot be applied to behavior falling short of some mythical, always-compliant nation. Instead, *jus cogens*, or the limited set of peremptory norms in international law such as the prohibition against genocide and torture,²⁰ may serve as a promising starting point for the rules of conduct in the offender model. Because *jus cogens* is often viewed as "a moral minimum that all communities must meet,"²¹ the analogy between *jus cogens* and criminal statutes is readily apparent,²² making an offender model designed to punish violators of these very worst of crimes both legally and morally justifiable. Alleged violations of rights less well-defined and more

18. See *supra* Section I.B.

19. See George P. Smith, II, *Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection?*, 38 VAND. J. TRANSNAT'L L. 1295, 1308 (2005) ("Seeking universality in application of human rights requires all states to respect a defined set or core of minimum standards of behavior.").

20. Article 53 of the Vienna Convention defines *jus cogens* as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

21. Larry May, *Crimes Against Humanity* 32 (2005) (emphasis omitted).

22. Scholars have long studied the similarity and connection between the core norms in international law and domestic law, beginning with H.L.A. Hart, who articulated the link between minimal natural law principles and rudimentary rules governing human societies. *Id.* at 31–32.

contested than *jus cogens* should properly be viewed under the contender model, and factors such as the country's wealth and culture should be taken into account.²³

II. THE UNEVEN HAND OF THE WORLD POLICE

Having concluded that China's human rights record compares favorably with many other low-income countries, Peerenboom next demonstrates the double standard that the United States adopts in its role as the chief enforcer of international human rights, examines several potential explanations for employing a double standard against China, and calls for an end to this practice (Chapter Five).

Peerenboom first shows that China has been subject to considerably more censure than many other countries with worse records across a range of indicators (p. 165). The United States and other Western powers are often quick to criticize China—initiating eleven attempts to censure China before the UN Commission on Human Rights in Geneva since 1990—while turning a blind eye to the gross violations of human rights in countries such as India and Saudi Arabia (pp. 163–64). In 2002, for example, China received a score of four on the Political Terror Scale (“PTS”) and was targeted for criticism in Geneva for systematic human rights violations (p. 169). In the same year, however, seven out of the eight countries with the worst PTS rating of five were not censured, and only three other countries among the twenty-two with the same PTS rating as China were similarly targeted (pp. 169–70).

Those who are quick to brand Peerenboom as an apologist for dictators might also dismiss his criticism of the *United States'* conduct as irrelevant to the assessment of *China's* human rights record or argue that Peerenboom's criticism proceeds upon the questionable assumption that enforcement of all rules must be uniform. Based on the analogy between the offender model and the criminal justice system, the skeptics may point to the fact that in the domestic criminal justice system, selective enforcement is often tolerated and sometimes even a necessary evil. Indeed, in the domestic legal system, selective prosecution is never a valid “defense on the merits to the criminal charge itself,”²⁴ for good reasons, and rarely excuses a defendant except when the prosecution is proven to be impermissibly discriminatory.²⁵ Likewise, one could argue that the failure to prosecute other offenders of human

23. See, e.g., Smith, *supra* note 19, at 1308 (“So long as [states] meet these [minimum core] standards, adjustments might allow for differing legal, moral, and cultural value systems within each state.”); Wall, *supra* note 14, at 603–04 (“The United States could make strides in human rights enforcement by keeping in mind that . . . cultural constraints exist in places such as China, where attempts to impose U.S. or Western norms in some cases amounts to an attempt to make apple pie out of egg rolls.”).

24. *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

25. *Id.* at 463–64 (outlining the elements necessary to a selective-prosecution claim and noting with approval that it is difficult to overcome the presumption that the prosecution was not motivated by discrimination).

rights does not make China's violations any less reprehensible and blameworthy, and selective enforcement may be legally defensible on a variety of grounds including—as one scholar has suggested in the similar “selective intervention” context—the limited resources available to law enforcement that renders uniform enforcement practically impossible.²⁶

Peerenboom rejects this “limited resources” justification for selective enforcement. Although one potential justification for applying a double standard to China is that improving the human rights situation in China, a country with one-fifth of the world's population, produces the biggest bang for the buck (p. 165), that justification fails to withstand Peerenboom's critical analysis. India has a population comparable to that of China and also has a PTS score of four for its violations of physical-integrity rights (p. 166). Moreover, India suffers from much more severe poverty than China, with twice as many people living on less than one dollar per day (p. 165). India's violations of human rights, including extrajudicial killing, torture, rape, and arbitrary detention, also appear to be at least as serious as, if not more egregious than, those of China (p. 166–68). Nonetheless, the United States “never once sponsored a motion to censure India for rights violations” between 1990 and 2004; nor has the U.S. State Department cited India as a country of political concern, despite its repeated condemnation of China for “egregious, systematic ongoing abuses” (p. 168). Population size, as Peerenboom concludes, “may matter, but apparently not when it comes to even-handed treatment of rights violations” (p. 169).

Peerenboom instead suggests that the uneven hand of the world police is more likely due to the longstanding bias of the international human rights regime against non-liberal democracies (p. 169), a bias that bears a dangerous resemblance to discriminatory prosecution in the domestic realm and runs directly counter to Justice Jackson's famous admonishment against using the law to selectively embarrass individuals disliked or deemed unpopular by those wielding prosecutorial power.²⁷ Indeed, all UN motions to censure countries for systematic human rights violations in 2002 were against nondemocracies, even though many democracies or semidemocracies had worse or equally poor records with respect to personal-integrity violations (p. 170).

Whatever the true reason may be, selective enforcement without sufficient justification, especially if systematically biased against certain groups, seriously undermines the legitimacy of the offender model as it is currently implemented. Just as selective enforcement of criminal statutes may “tip[] the scales of justice so far over that it . . . seriously undermine[s] the credi-

26. See Lea Brilmayer, *What's the Matter with Selective Intervention?*, 37 ARIZ. L. REV. 955, 967 (1995) (analogizing the United States' selective intervention in the international context to domestic law enforcement and recognizing that law enforcement often must be prioritized to “get the most ‘bang’ for one's law enforcement ‘buck’”).

27. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940) (“[A] prosecutor [must not] pick[] some person whom he dislikes or desires to embarrass, or select[] some group of unpopular persons and then look[] for an offense . . .”).

bility of the justice system as a whole,"²⁸ selectively censuring countries for human rights issues can have similarly counterproductive effects. "[T]he evident hypocrisy of picking and choosing the point at which to raise the issue of human rights" will likely backfire because "[w]hen norms are inconsistently followed, they simply lose their character as norms."²⁹ Going after certain countries for human rights violations while tolerating similar or even more egregious conduct elsewhere, without a principled justification for such selective behavior, will also undermine U.S. credibility in its role as the chief advocate and enforcer of the international human rights regime.³⁰

The risks of unprincipled selective enforcement of the offender model have materialized in China's reaction to American-led name-and-shame sanctions. The Chinese government, repeatedly and specially targeted with shaming punishments for its alleged human rights violations, "is often quick to assume a defensive posture, stonewalling or defending its record at length . . . rather than exploring constructive ways to improve the current situation" (p. 164). Chinese citizens likewise became increasingly suspicious of the motives of NGOs and highly critical of the U.S. government (p. 165). As support among Chinese citizens for international reform efforts weakens (p. 164), nationalist sentiments grow stronger than ever, based not just on the pride in the Chinese culture but also on feelings of resentment toward the United States, making it even less likely for a peaceful and cooperative relationship to exist between those powers (p. 165). Given these counterproductive consequences of selective enforcement, Peerenboom calls for an end to the "double standard" that the U.S. government employs towards China (p. 183).

Examined under the offender–contender framework, however, *China Modernizes* could have gone one step further: the root cause of selective enforcement is more than just the United States' subjective willingness to turn a blind eye to the behavior of other countries; rather, it may be that the overly inclusive core standards of conduct in the current offender model provide the United States ample opportunity to pick and choose from a wide range of targets. The bidirectional causal link between overcriminalization and selective enforcement is extensively discussed and well understood in the domestic legal realm. As criminal law expands to regulate an ever-increasing range of conduct, prosecutorial resources will be strained and selective prosecution becomes inevitable;³¹ and when the executive branch is entrusted with prosecutorial discretion, legislatures tend to enact more

28. Lis Wiehl, "Sounding Black" in the Courtroom: Court-Sanctioned Racial Stereotyping, 18 HARV. BLACKLETTER L.J. 185, 207 (2002).

29. Lea Brilmayer, *The Odd Advantage of Reliable Enemies*, 32 HARV. INT'L L.J. 331, 338 (1991).

30. See Wall, *supra* note 14, at 603.

31. See Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 168 (1967).

broadly sweeping criminal statutes.³² In today's international human rights regime, which is largely based on an expansive offender model, it is therefore unsurprising that overcriminalization (the use of a broad set of core standards of conduct) and selective enforcement are mutually reinforcing. As a result, targeting selective enforcement alone may not be effective: the international human rights regime must also refrain from zealously applying the offender model to criminalize an overbroad range of conduct and should instead adopt the contender model when evaluating a country's performance outside the minimum core rights.

CONCLUSION

Between China and the United States, the focus of the debate has been, and likely will continue to be, different and often incompatible interpretations of human rights. "[W]ith all the fervor of a religious zealot," the United States, especially the current administration (pp. 178–79), has taken the stance that China needs to conform to the U.S. vision of human rights, rule of law, and democracy,³³ but China, echoing Confucius's principle of "harmony, but not conformity," from two millennia ago,³⁴ may be more inclined to insist on its own interpretation of human rights and to follow its own agenda on institutional reforms. For those of us caught in between, *China Modernizes* offers a refreshing look at the two sides of the controversy behind the rhetoric. At its core, the debate presents the question of choosing a proper balance between two competing approaches to enforcing the international human rights regime: the offender model, which the United States would apply, along with the broad set of rules of conduct it prescribes; and the contender model, which China and much of the less wealthy developing world would undoubtedly prefer.

32. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 (2001).

33. On the origin, development, and failure of this "benevolent hegemony" strategy, see Francis Fukuyama, *After Neoconservatism*, N.Y. TIMES, Feb. 19, 2006, § 6 (Magazine), at 62.

34. See THE ANALECTS OF CONFUCIUS § 13.23) (Simon Leys trans., W.W. Norton & Company 1997) ("The Master said: 'A gentleman seeks harmony, but not conformity. A vulgar man seeks conformity, but not harmony.'").

