

THE RIGHT OF WOMEN TO CHILD CARE IN THE UNITED STATES

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Abstract: This essay argues that international law binds the United States to adopt comprehensive policy providing accessible and affordable child care as a right of women. Women disproportionately assume the responsibility of unpaid and undervalued child care and therefore are impeded from full participation in public life. These discriminatory effects compound for minority women. Despite its wealth, the United States is outside the mainstream of international morality and out of bounds of its obligations under the American Declaration, ICCPR, ICERD, and customary international law. This essay employs intersectionality analysis and the due diligence principle to add missing texture to the significance of this debate for the United States. The plan proposed by Senator Elizabeth Warren in her 2020 bid for president meets the United States' affirmative obligations. In adopting this plan, the United States would also align with its allies and advance its own economic, political, and security interests.

INTRODUCTION

COVID-19 has laid bare the underinvestment in child care in the United States.¹ Individual parents and the labor market are now having to reckon with the absence of accessible and affordable child care. Some daycares are closed and many are in distress.² This crisis has devastating implications for women's

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¹ See generally Nicole M. Elias & Maria J. D'Agostino, *Care in Crisis: COVID-19 as a Catalyst for Universal Child Care in the United States*, 43 ADMIN. THEORY & PRAXIS 217, 217–29 (2021) (arguing COVID may compel change and drawing historical parallels to the Latham Act, which created a temporary child care system in the United States during WWII).

² Tommy Beer, *40% of U.S. Child Care Centers Say They'll Close Permanently Without Public Assistance*, FORBES (July 15, 2020), <https://www.forbes.com/sites/tommybeer/2020/07/14/40-of-us-child-care-centers-say-theyll-close-permanently-without-public-assistance/?sh=4fdda9516ad6> [<https://perma.cc/U9C2-NW36>].

ability to participate in public life on an equal footing with men.³ Women disproportionately shoulder the responsibility of child care.⁴ Minority women, who are more likely to have low-paying jobs, lack access to child care, and be single heads of households, are hit particularly hard by the child care crisis.⁵ Against the backdrop of these challenges, Senator Elizabeth Warren, during her bid for the Democratic Party's nomination for president, put forward a comprehensive plan providing a right to accessible and affordable child care.⁶

This essay locates the right to child care as a right of women under international law. The United States is a party to the American Declaration,⁷ the International Covenant on Civil and Political Rights (ICCPR),⁸ and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁹ These treaties prohibit discrimination and require the United States to take steps to achieve effective equality for women, while addressing impacts on minority women. Child care policy is necessary to these goals.¹⁰ Despite

³ Avie Schneider, Andrea Hsu & Scott Horsley, *Multiple Demands Causing Women to Abandon Workforce*, NPR (Oct. 2, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/02/919517914/enough-already-multiple-demands-causing-women-to-abandon-workforce> [https://perma.cc/Y8BU-KDDA] (“Women are leaving the workforce at four times the rate as men.”).

⁴ *Id.* (“[T]he Labor Department finds that married mothers do almost double the amount of household chores and parenting as married fathers.”); see Aliya Hamid Rao, *Even Breadwinning Wives Don’t Get Equality at Home*, THE ATLANTIC (May 12, 2019), <https://www.theatlantic.com/family/archive/2019/05/breadwinning-wives-gender-inequality/589237/> [https://perma.cc/FHW9-R95V] (reporting same).

⁵ Eleanor Mueller, *‘Crashing Down: How the Child Care Crisis is Magnifying Racial Disparities*, POLITICO (July 22, 2020) <https://www.politico.com/news/2020/07/22/coronavirus-child-care-racial-disparities-377058> [https://perma.cc/Q8DV-8FAT]; accord JULIE VOGTMAN, NAT’L WOMEN’S L. CTR., UNDERVALUED: A BRIEF HISTORY OF WOMEN’S CARE WORK AND CHILD CARE POLICY IN THE UNITED STATES 4–10 (2017), https://nwlc.org/wp-content/uploads/2017/12/final_nwlc_Undervalued2017.pdf [https://perma.cc/EB5L-S83W].

⁶ Elizabeth Warren (@TeamWarren), *My Plan for Universal Child Care*, Medium (Feb. 19, 2019), <https://medium.com/@teamwarren/my-plan-for-universal-child-care-762535e6c20a> [https://perma.cc/Q8W7-7QSA].

⁷ American Declaration on the Rights and Duties of Man, Res. XXX, Final Act of the Ninth International Conference of American States (Pan American Union), Bogota, Columbia, Mar. 30–May 2, 1948, at 38, reprinted in Handbook of Existing Rules Pertaining to Human Rights, OEA/Ser.L/V/II.23 Doc. 21 Rev. 6, at 5 (1979), <https://www.oas.org/en/iachr/mandate/Basics/declaration.asp> [https://perma.cc/4NY3-W4KX] [hereinafter American Declaration].

⁸ International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, S. Exec. Doc. No. E, 95-2 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter IC-CPR]. The United States ratified the treaty on June 8, 1992. *Id.*

⁹ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, S. Treaty Doc. No. 95-18, 660 U.N.T.S. 195, 212 (entered into force Jan. 4, 1969) [hereinafter ICERD].

¹⁰ See, e.g., INT’L LAB. ORG., LABOUR AND HUMAN RIGHTS FRAMEWORKS PROMOTING CHILD-CARE FOR ALL WORKERS: ILO AND WIEGO POLICY BRIEF NO. 2, at 2–3 (2020), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/genericdocument/wcms_737553.pdf [https://perma.cc/AT8X-ZC8K] (citing child care as a “prerequisite[]” to satisfying human rights obligations to women).

being an outlier for not ratifying the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹¹ and the International Convention on Economic, Social and Cultural Rights (ESCR),¹² the United States must comply with the customary international law obligations embodied in these treaties, including the right to child care.

The first Part of this essay examines the lack of adequate child care, its effect on women's equality, and Senator Warren's proposal. The second Part of this essay argues that international law creates a right of women to affordable and accessible child care and examines countervailing concerns, including perpetuating the stereotype of vulnerability, de-emphasizing quality of care, and resource allocation. This essay does not offer an in-depth policy analysis of Senator Warren's proposal, nor does it map the practical pathway to accomplishing this legislative agenda. This essay contributes to scholarship in this area by arguing that the United States has an international law obligation to women to adopt adequate child care policy and that Senator Warren's proposal meets this obligation.¹³ Where a right creates an affirmative obligation, states must act with due diligence.¹⁴ The United States should adopt comprehensive child care policy because doing so is both the right thing to do under international law and advances the United States' own societal interests.

¹¹ Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33 (1980), 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW].

¹² International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ESCR].

¹³ America's economy is stunted by the structural "impediments to [women's] full participation" in the economy. Roger C. Altman, Penny Pritzker & Robert E. Rubin, *Foreword*, in THE HAMILTON PROJECT, THE 51% DRIVING GROWTH THROUGH WOMEN'S ECONOMIC PARTICIPATION 1, 1 (Diane Whitmore Schanzenbach & Ryan Nunn eds., 2017), https://www.brookings.edu/wp-content/uploads/2017/10/es_101917_the51percent_full_book.pdf [<https://perma.cc/P3BZ-C23X>]; accord Elizabeth U. Cascio, *Public Investments in Child Care*, in *id.* at 123, 123–41; Ryan Nunn & Megan Mumford, *The Incomplete Progress of Women in the Labor Market*, in *id.* at 19, 19–32.

¹⁴ See, e.g., U.N. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, U.N. Doc. CEDAW/C/GC/35 (2017) (finding a "culture of impunity" regarding violence against women and affirming that due diligence requires states to take affirmative measures to remedy this situation).

I. THE CHILD CARE CRISIS, ITS EFFECTS ON WOMEN, AND SENATOR WARREN'S PROPOSAL

A. Inadequate Child Care Is a Structural Impediment to Women's Equal Participation in Public Life and Perpetuates Discrimination

Since President Nixon vetoed the Comprehensive Child Development Act in 1971 sighting concerns about the preservation of the family,¹⁵ the United States has not comprehensively addressed child care.¹⁶ Women cannot participate fully in public life without a system of adequate child care because women disproportionately bear the responsibility for this work.¹⁷ This country has not adopted universal pre-kindergarten, and care, if available, is expensive.¹⁸ Despite this high cost, care workers, who are disproportionally minority women, are underpaid and have difficulty supporting their own households.¹⁹ In the United States, beginning at the turn of the last century, women have lost ground in the work force in terms of employment and economic security; this trend stands in contrast to other industrialized nations.²⁰ Although the feminist movement has propelled the United States to reduce formal barriers to equality, structural inequality remains.²¹

¹⁵ Jack Rosenthal, *President Vetoes Child Care Plan as Irresponsible*, N.Y. TIMES (Dec. 10, 1971), <https://www.nytimes.com/1971/12/10/archives/president-vetoes-child-care-plan-as-irresponsible-he-terms-bill.html> [<https://perma.cc/9XK6-RY6S>].

¹⁶ See Martha F. Davis & Roslyn Powell, *The International Convention on the Rights of the Child: A Catalyst for Innovative Childcare Policies*, 25 HUM. RTS. Q. 689, 706–10 (2003) (describing the United States' "limited" and "fragmented" efforts to set up a nationwide child care system, and the programs central to that effort). The United States has some child care policy, mostly to benefit low-income populations; however, these efforts are underfunded, limited in accessibility, and serve only a portion of the eligible population. *Id.*

¹⁷ INT'L LAB. ORG., *supra* note 10, at 3, 5 (noting "the duties States have to . . . recognize women's greater and unequal responsibility for childcare and the resulting discrimination and inequality they face in the labour market" and reporting that in many countries, women are unable to realize their full earning potential due to their child care obligations); see also *supra* note 4 and accompanying text.

¹⁸ Cascio, *supra* note 13, at 128–31.

¹⁹ Mueller, *supra* note 5.

²⁰ Sandra E. Black, Diane Whitmore Schanzenbach & Audrey Breitwieser, *The Recent Decline in Women's Labor Force Participation*, in THE HAMILTON PROJECT, *supra* note 13, at 5, 5–6.

²¹ See, e.g., Kyleanne Hunter, *Shoulder to Shoulder Yet Worlds Apart: Variations in Women's Integration in the Militaries of France, Norway and the United States* 31–66 (Aug. 2019) (Ph.D. dissertation, University of Denver), <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=2665&context=etd> [<https://perma.cc/HCR5-QL2V>]. ("The overarching focus of those rooted in individual equality is on empowerment of individuals and removing formal barriers to success without guaranteeing any particular outcome. Structural, institutional, or social mechanisms of inequality are greatly downplayed.") The feminist movement in the United States successfully removed many formal barriers to equality by focusing on the sameness between genders. *Id.* Feminist movements in other countries have embraced gender difference to address structural inequalities. *Id.* at 31–66. For critique of

B. Intersectional Analysis Reveals That the Child Care Crisis Burdens Minority Women

In the United States, “71 percent of black mothers and 41 percent of Latina mothers serv[e] as the primary economic support for their families.”²² Minority women face multiple forms of discrimination in the labor market.²³ The pandemic is impacting the health of the Black community at a higher rate than that of the white population.²⁴ Racial justice issues are presently at the forefront of political and cultural life in the United States, causing psychological distress for many Black women and their families.²⁵ Black and Latina women disproportionately work in the child care industry, own child care businesses, live below the poverty line, and live in areas without child care options.²⁶ These statistics indicate that inattention to this structural impediment has a disparate impact on minority women. This structural exclusion of minority women from full participation in public life is both cause and effect of discrimination: it makes it harder for minority women to participate in public life and it exists because of a data gap—fewer minority women policymakers with this direct personal experience are at the table.

C. Senator Warren’s Plan to Remedy the Child Care Crisis

Senator Warren’s comprehensive plan for universal child care for children ages 0-5 is at no-cost for families living at “200% of the federal poverty line,” and at a cost of “no more than 7%” of household income for families above that threshold.²⁷ The plan increases care workers’ pay, imposes national standards for quality, and provides for substantial federal funding (paid largely by taxes on wealthy Americans) to partner with local providers.²⁸ Senator Warren experienced this impediment herself; without her Aunt Bee, who cared for her

the sameness approach to gender equality and an argument for a difference-based approach, see CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 44–57 (2005).

²² Leila Schochet, *The Child Care Crisis Is Keeping Women Out of the Workforce*, CTR. FOR AM. PROGRESS (Mar. 28, 2019), <https://www.americanprogress.org/issues/early-childhood/reports/2019/03/28/467488/child-care-crisis-keeping-women-workforce/> [<https://perma.cc/P9XF-ZFJG>].

²³ Jennifer L. Berdahl & Celia Moore, *Workplace Harassment: Double Jeopardy for Minority Women*, 91 J. APPLIED PSYCH. 426, 426–36 (2006).

²⁴ Jazmyin T. Moore et al., *Disparities in Incidence of COVID-19 Among Underrepresented Racial/Ethnic Groups in Counties Identified as Hotspots During June 5–18, 2020—22 States, February–June 2020*, in 69 U.S. DEP’T OF HEALTH & HUM. SERVS. CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT 1122, 1122–26 (2020).

²⁵ Tiffany Burns et al., *Women in the Workplace 2021*, MCKINSEY & Co. (Sept. 27, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> [<https://perma.cc/P47S-X6DS>].

²⁶ Mueller, *supra* note 5.

²⁷ Warren, *supra* note 6.

²⁸ *Id.*

young children as she began her career in law, Senator Warren may never have reached her influential position in public life.²⁹ Unfortunately, not much has changed since Senator Warren started her career and, as her story highlights, women are all-too-easily left out of public life because of the United States' inattention to this dilemma. Senator Warren's plan is based on the premise that child care should be a right. This essay examines the foundations of that right as a human right of women.

II. EQUALITY AND ANTI-DISCRIMINATION CREATE A POSITIVE OBLIGATION TO ADOPT ADEQUATE CHILD CARE POLICY

A. The American Declaration Incorporates Customary International Law Including Positive Obligations: The Lenahan Case

A positive obligation is one that requires a state to act affirmatively, where a negative obligation means only that a state must refrain from infringing on a particular right.³⁰ As *Jessica Lenahan (Gonzales) v. United States* makes clear, international human rights law imposes affirmative obligations. When there is an affirmative obligation, a state must act with due diligence.

In *Lenahan*, the Inter-American Commission on Human Rights (Commission) examined whether customary international law norms were binding on the United States and if so, whether a duty of due diligence attached.³¹ The Commission answered yes to both questions and located the obligations in the American Declaration Article II, which provides that "[a]ll people are equal before the Law and have the rights and duties enshrined in this declaration without distinction of . . . sex."³² The facts of *Lenahan* are both straightforward and horrific: Jessica Lenahan repeatedly, over a ten-hour period, asked the local police department to enforce a restraining order against her ex-husband, whom she believed had abducted her three daughters.³³ Tragically, the police failed to act; the ex-husband initiated a shoot-out at the police station, during which he was killed, and after which the bodies of the girls were discovered in his truck.³⁴

²⁹ *Id.*; see also Jill Filipovic, *Elizabeth Warren's Life Story Proves She's Right to Put Childcare First*, THE GUARDIAN (Feb. 22, 2019), <https://www.theguardian.com/commentisfree/2019/feb/22/elizabeth-warren-childcare-2020-election> [<https://perma.cc/3L6K-TECT>].

³⁰ For a positive rights approach to child care, see generally Purvi Patel, *Valuing Care in a Liberal Society: A Rights-Based Analysis*, 9 GEO. J. GENDER & LAW 427 (2008).

³¹ *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, ¶¶ 1–2, 5 (2011).

³² *Id.*; see also American Declaration, *supra* note 7.

³³ *Lenahan*, Report No. 80/11, ¶ 24.

³⁴ *Id.* ¶ 32.

Jessica Lenahan argued that the United States discriminated against her and denied her equality by failing to investigate and enforce the restraining order.³⁵ The United States argued that the equality and anti-discrimination provisions of the American Declaration were aspirational, non-binding, and did not address police action to protect against private violence.³⁶ The United States further argued that the due diligence principle lacked sufficient specificity.³⁷

The Commission rejected the United States' arguments and found an affirmative obligation.³⁸ This duty included the duty to take appropriate measures to end discrimination and provide for equality under the law.³⁹ It further reasoned that the principle of non-discrimination was both "a fundamental principle of the inter-American system of human rights" and "the backbone of the universal . . . protection of human rights."⁴⁰ The Commission noted it has consistently found that this concept is not merely a negative obligation not to infringe on rights, but that it requires affirmative policy and legislation adopting appropriate measures necessary to fulfill these rights.⁴¹ The Commission found a "strong [and well-recognized] connection between the problems of discrimination and violence against women."⁴² The Commission's rationale recognized that women experience discrimination at higher rates where they have multiple discrimination risk factors based on categories other than gender, including race, age, and ethnic origin status, among other factors.⁴³

The Commission's rationale locating the due diligence duty in the anti-discrimination and equality provisions of the American Declaration applies to the right to child care. There is a strong link between discrimination, inequality, and lack of adequate child care policy in the United States. Employment discrimination law is rife with examples of stereotypical bias and discrimination against women for their role as mothers.⁴⁴ Congress recognizes this problem and has addressed bias against mothers and mothers-to-be in the labor market.⁴⁵ The Supreme Court recognizes that stereotypes about mothers and

³⁵ *Id.* ¶¶ 40–44.

³⁶ *Id.* ¶ 106.

³⁷ *Id.*

³⁸ *See id.* ¶¶ 101–136.

³⁹ *See id.*

⁴⁰ *Id.* ¶ 107.

⁴¹ *Id.* ¶ 118.

⁴² *Id.* ¶¶ 110–111.

⁴³ *Id.* ¶ 111.

⁴⁴ *See, e.g., Muller v. Oregon*, 208 U.S. 412, 421–22 (1908) (holding that concern for a women's existing or potential offspring is recognized as appropriate justification for protective legislation limiting women's economic opportunities), *superseded by statute*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

⁴⁵ *See, e.g., Pregnancy Discrimination Act (PDA) of 1978*, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)); Family Medical Leave Act (FMLA) 29 U.S.C.

mothers-to-be in the workplace are pervasive.⁴⁶ These stereotypes are reinforced by and perpetuate the structural inequality that women face by undertaking society's child care responsibility.⁴⁷

This problem is rooted in the separate spheres belief system, which relegates women to the home and elevates men to positions in public life, effectively giving men greater power and economic benefit.⁴⁸ In America, there is backlash against advancing women's equality to preserve woman's place in the home.⁴⁹ Pioneer feminists often had to assimilate to the male workplace model by showing that they were as unburdened by family obligations as their male counterparts.⁵⁰ This struggle bred the vantage point that economic integration is a woman's problem and that the solution is for women to prove worth by behaving like stereotypical men.⁵¹

As this vantage point predominated, the United States failed to wrestle with the structural impediments that prevent women from achieving equality.⁵² An individual woman's ability or inability to reconcile family and child care responsibilities with career goals is viewed as the result of the personal choices and efforts of that woman and not in terms of the underlying systemic impedi-

§ 2612(a)(1)(A); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified as amended at 29 U.S.C. § 206(d)).

⁴⁶ See, e.g., *Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 737 (2003) (holding that the FMLA was valid prophylactic legislation under the Equal Protection clause because it sought to remedy severe and pervasive sex discrimination by the states in providing and administering leave); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1884 (2006) (arguing that Chief Justice Rehnquist's evolution in thinking in writing the decision in *Hibbs* can be seen as the country's recognition of the systemic stereotyping of women and its effects in the labor market).

⁴⁷ See Beth Goldblatt, *Litigating Equality—The Example of Child Care*, 2001 ACTA JURIDICA 8, 11–12 (advocating that the right to child care is firmly rooted in the equality principle embedded in the South African Constitution); Elizabeth Shilton, *Family Status Discrimination: "Disruption and Great Mischief" or Bridge Over the Work-Family Divide?*, 14 J. L. & EQUAL. 33, 36–37 (2018) (explaining that human rights and equality-based litigation strategies account for Canadian employers' family care obligations).

⁴⁸ See, e.g., Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010) (arguing that American sex discrimination litigators took aim at laws limiting men's family roles because of the corollary that these laws ensure women bear exclusive responsibility in that sphere).

⁴⁹ See Siegel, *supra* note 46, at 1874–81 (discussing the backlash against the proposed Equal Rights Amendment (ERA)); see also, Claire Cain Miller, *Why the U.S. Has Long Resisted Universal Child Care*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/upshot/why-americans-resist-child-care.html> [<https://perma.cc/MFH6-GNR9>] (revealing the U.S.'s moral reticence towards policy enabling mothers to work despite a body of research strongly suggesting that investing in child care "more than pays for itself" and has benefits that "extend for generations").

⁵⁰ Anne-Marie Slaughter, *Why Women Still Can't Have It All*, THE ATLANTIC (June 13, 2012), <https://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/> [<https://perma.cc/3WLD-ADD7>].

⁵¹ *Id.*

⁵² *Id.*

ments.⁵³ Women's progress towards equality in terms of economic power and positions of leadership, thus, has stagnated in the United States.⁵⁴ Women continue to shoulder more of the responsibility of child care.⁵⁵ Additionally, child care for infants and pre-school-aged children is expensive and out of reach for many working families.⁵⁶ It is no answer to inaction to argue that effecting a right of women to child care perpetuates the stereotype of female vulnerability: a right to childcare is a symmetrical law⁵⁷ applicable equally to both male and female caregivers even if adopted primarily to benefit the latter. A reprioritization of care work would benefit all of society, including men and children, while remedying structural impediments faced by women.⁵⁸

As in *Lenahan*, the link between gender discrimination, inequality, and lack of adequate child care policy is strong. The United States has an affirmative duty under the American Declaration to take appropriate affirmative measures. Finding a strong link between gender discrimination, inequality, and inadequate child care policy, this essay looks further to how the corpus of international law views the right of women to child care.

⁵³ *Id.*

⁵⁴ *Id.* "On average, women are promoted at a lower rate than men. . . . [E]ntry-level women are 18 percent less likely to be promoted than their male peers. . . . If entry-level women were promoted at the same rate as their male peers, the number of women at the senior vice president and C-suite levels would more than double." Burns et al., *supra* note 25. The recent COVID-19 crises has upset the situation substantially, as "[m]any [employees] feel like they're 'always on' now that the boundaries between work and home have blurred." *Id.* Further, "[w]omen in particular have been negatively impacted" as they are "more likely to have been laid off or furloughed [due to] the COVID-19 crisis" and "the supports that made [being a working mother] possible—including school and childcare—have been upended." *Id.* (footnote omitted).

⁵⁵ See *supra* note 4 and accompanying text.

⁵⁶ See Rao, *supra* note 4 (noting the importance of critical "social supports" such as "subsidized child care" in making "arrangements where both spouses work and split housework" feasible). Studies have shown that "working families with children under five" spend roughly 10% of their annual income on child care, which is "40 percent higher than the U.S. Department of Health and Human Services' definition of affordability." Rasheed Malik, *Working Families Are Spending Big Money on Child Care*, CTR. FOR AM. PROGRESS (June 20, 2019), <https://www.americanprogress.org/issues/early-childhood/reports/2019/06/20/471141/working-families-spending-big-money-child-care/> [<https://perma.cc/K276-QB24>]. For low-income families with children under five the percentage is even greater. *Id.*

⁵⁷ See Naomi Schoenbaum, *The Case for Symmetry in Antidiscrimination Law*, 2017 WIS. L. REV. 69, 71 (arguing that symmetrical laws minimize perceptions of favoritism).

⁵⁸ See generally Eugenia Caracciolo di Torella, *Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union*, 20 EUR. L.J. 88 (2014) (unpacking the two-sphere system's effects on men and women and arguing for legislative efforts supporting the role of fatherhood).

B. CEDAW Highlights Customary Obligations Binding on the United States

Although the United States has not ratified CEDAW, the convention provides a customary source of international law obligations binding on the United States under the *Lenahan* doctrine. The binding nature is grounded in “international morality [rather] than on formal consent.”⁵⁹ The moral consensus on women’s equality is evident in the vast quantity of law enacted to give it effect.⁶⁰ CEDAW, even where not adopted, gives the consensus idea practical definition.

The CEDAW affirms “the dignity and worth of the human person[.]” “the equal rights of men and women,” and the State parties’ obligations to “ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights.”⁶¹ CEDAW acknowledges that despite efforts and affirmations of equality, “extensive discrimination against women continues to exist.”⁶² More specifically, the treaty’s preamble addresses the role of maternity in relation to family and society:

Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole⁶³

This statement makes explicit the need to reverse the undervaluing of child care. Read together with the statement on woman’s right to participate in public life on equal footing with man, the preamble expresses a need to implement structural change to erode the separate spheres’ barriers and rectify the artifi-

⁵⁹ Shirley C. Wang, *The Maturation of Gender Equality into Customary International Law*, 27 N.Y.U. J. INT’L L. & POL. 899, 899–900 (1995) (arguing that “[g]ender equality . . . rapidly is maturing into customary international law”).

⁶⁰ See *id.* at 908. As of 2014, 143 of 195 countries had a constitutional provision for women’s equality. *Infographic: Human Rights of Women*, UN WOMEN (Dec. 8, 2015), <https://www.unwomen.org/en/digital-library/multimedia/2015/12/infographic-human-rights-women> [<https://perma.cc/3C2L-M2SL>]. Between 2010 and 2020, 131 countries adopted 274 laws and policies promoting gender equality. UN WOMEN, GENDER EQUALITY: WOMEN’S RIGHTS IN REVIEW 25 YEARS AFTER BEIJING 4 (2020), <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Gender-equality-Womens-rights-in-review-en.pdf> [<https://perma.cc/KFR8-V8HK>] [hereinafter U.N. WOMEN, GENDER EQUALITY].

⁶¹ *Convention on the Elimination of All Forms of Discrimination against Women* New York, 18 December 1979, OFF. OF THE HIGH COMM’R, U.N. HUM. RTS. COMM’N, <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx> [<https://perma.cc/LS2W-HQMH>].

⁶² *Id.*

⁶³ CEDAW, *supra* note 11, pmbl.

cial devaluation of the care of children that has historically been segregated to the sphere of the second sex.

Significantly, CEDAW also defines the term “discrimination” in Article 1, and thus provides a test for where it may occur. Discrimination is any “distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying . . . [women’s equal participation] in the political, economic, social, cultural, civil or any other field.”⁶⁴ The “effect or purpose” terminology is crucial because it recognizes substantive equality as well as formal equality. The lack of child care is an issue that has the effect of restricting women’s participation in public life on an equal footing with men. It is therefore discrimination regardless of any purpose of the state in failing to prioritize child care.

Article 2 requires states “to pursue by all appropriate means and without delay a policy of eliminating discrimination[,]” including the adoption of “appropriate legislation.”⁶⁵ Article 3 requires states to take “all appropriate measures” to guarantee women the full enjoyment of public life on an equal footing with men.⁶⁶

CEDAW makes the connection between women’s rights and the right to child care most explicit in Article 11, where it states that “[i]n order to prevent discrimination” and “ensure [women’s] “effective right to work,” states must “take appropriate measures” to develop social programs “to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities.”⁶⁷

Although CEDAW is not binding as a treaty, the connections it draws with regard to inequality, discrimination, and child care reinforce the conclusion that the United States has a moral obligation to act.

C. The Link Between Economic/Civil Rights and Social/Political Rights Is Also Authority for Adequate Child Care Policy

1. ICCPR

The United States ratified the ICCPR in 1992.⁶⁸ Upon ratification, the ICCPR became the supreme law of the land, and the United States must com-

⁶⁴ *Id.* art. 1.

⁶⁵ *Id.* art. 2.

⁶⁶ *Id.* art. 3.

⁶⁷ *Id.* art. 11.

⁶⁸ *Status of Ratification Interactive Dashboard*, OFF. OF THE HIGH COMM’R, U.N. HUM. RTS. COMM’N, <https://indicators.ohchr.org/> [<https://perma.cc/XLA8-2Z6X>] (Jan. 13, 2022) (choose “International Covenant on Civil and Political Rights” from “Select a treaty” dropdown; then hover over the United States on the global map).

ply with its terms to the same extent as other federal law. Article 3 of the IC-CPR requires state parties to “undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.”⁶⁹ Article 26 further provides that “[a]ll persons are equal before the law” and have a right to equal and effective protection against discrimination.⁷⁰

The Human Rights Committee General Comment 28 provides guidance on responsibilities under the ICCPR.⁷¹ This guidance specifically provides that compliance includes the removal of structural impediments.⁷² Just as the lack of child care is a structural impediment to women’s participation in the labor market, it is also an impediment to participation in political life and therefore must be removed under this treaty.

2. ESCR

The United States is not a party to the ESCR; however, the ESCR provides another source of customary international law that supports the finding of a right to adequate child care. Article 7 specifically addresses the right of women to have equal conditions of employment with men, and the right of all to “a decent living” and opportunities for promotion limited only by “seniority and competence.”⁷³ In the current environment women do not have these rights because women are disproportionately responsible for child care. Article 10 recognizes the family as the “fundamental group unit of society” and provides that states should provide assistance to the family in meeting the care and educational needs of children.⁷⁴ The United States is currently failing in meeting these obligations because the cost of formal child care makes it out of reach for many families and therefore inhibits women’s effective participation in public life. Furthermore, the Committee on Economic, Social, and Cultural Rights has interpreted the right to an adequate standard of living to include the availability and affordability of child care.⁷⁵

⁶⁹ ICCPR, *supra* note 8, art. 3.

⁷⁰ *Id.* art. 26.

⁷¹ See generally Off. of the High Comm’r, U.N. Hum. Rts. Comm., CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

⁷² *Id.* ¶ 3.

⁷³ ESCR, *supra* note 12, art. 7.

⁷⁴ *Id.* art. 10.

⁷⁵ See, e.g., Comm. on Econ., Soc. & Cultural Rts., U.N. Econ. & Soc. Council, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland, U.N. Doc. E/C.12/GBR/CO/6, ¶¶ 43, 44 (July 14, 2016); see also, Davis & Powell, *supra* note 16, at 692 (citing Comm. on Econ., Soc. & Cultural Rts., U.N. Econ. & Soc. Council, Concluding Observa-

Although the ESCR obligations are generally progressive—rather than immediate—in nature, this is not true for the guarantees of equality and anti-discrimination. As previously discussed, both of these concepts are applicable to child care. Even were this not the case, the progressive nature of the ESCR should not be read to justify inertia.⁷⁶ At most, progressive compliance might leave room for countervailing resource allocation concerns. These concerns may justify compromise and efficiency in child care policy but not inattention to affordability and accessibility of child care. Senator Warren’s plan meets the criteria. It is fair to say, however, that a political compromise yielding a plan with slightly less funding or slightly more cost born by individual parents could also be an appropriate measure.

3. ICERD

ICERD prohibits racial discrimination, requires equality for all races, and specifies that this right to equality shall apply to economic, social, and cultural rights.⁷⁷ This treaty mandates that State parties take “concrete measures” to develop and protect the economic, social, cultural rights of certain racial groups or individuals of that group when the “circumstances so warrant.”⁷⁸ The circumstances in the United States warrant adoption of adequate child care policy to protect minority women. Without such policy minority women will continue to be at a systemic disadvantage in terms of economic, social, and cultural equality because of the historic barriers to access and the current discrimination these groups face. The United States is a party to this treaty, and it buttresses the conclusion that child care is a right, especially when considering the plight of minority women.

D. The Scope of the Right to Adequate Child Care Policy

The contours of the right to child care must include accessibility and affordability. Senator Warren’s plan meets these criteria and therefore it is an appropriate measure that should be adopted without delay. There is a difference between ensuring the availability and accessibility of child care and the government funding child care. Theoretically, if the private market were providing affordable care, then the government could feasibly make the argu-

tions of the Committee on Economic, Social, and Cultural Rights: Canada, U.N. Doc. E/C.12/1/Add.31, ¶ 42 (Dec. 10, 1998)).

⁷⁶ Comm. on Econ., Soc. & Cultural Rts., U.N. Econ. & Soc. Council, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 16, U.N. Doc. E/C.12/2005/4 (Aug. 11, 2005).

⁷⁷ ICERD, *supra* note 9, art. 5.

⁷⁸ *Id.* art. 2.

ment that it is only required to make sure it is available. The private market has failed, however, to provide affordable child care and the government must therefore step in and provide funding. Stated another way, “accessible and available” implies “affordable” and this in turn requires a public investment from the state, especially in a wealthy country like the United States.

Comparison to other states reinforces the conclusion that accessibility and affordability are both critical. In 2013, Germany adopted universal child care for children under three and this has demonstrated a positive impact on women’s economic success between 2013 and 2017.⁷⁹ Chile’s expansion of its free child care program showed an increase in access for low-income families, and a Nairobi program providing vouchers to women for child care services showed a positive impact on those women’s employment over time.⁸⁰ The United States, however, ranks thirtieth of thirty-three OECD nations in public investment in child care, and its parents have the third highest child care costs, paying on average 33.2% of household income for child care.⁸¹

One potential drawback of locating the right to child care as a right of women is that this approach could de-emphasize the right of the child and the corresponding obligation to provide high-quality care. I do not suggest, however, that policy should exclusively be grounded in women’s rights, and I recognize, as does international law, that a holistic rights approach is appropriate. In doing so, however, we should not lose sight of what the right to child care will mean for women.

III. THE UNITED STATES’ ECONOMIC, POLITICAL, AND SECURITY INTERESTS

As the evidence from other countries suggests, state support of child care is not only the right thing to do but also the smart thing to do. In the information age, the United States needs to draw from the ideas, efforts, and talents of its entire population to compete and lead globally.⁸² A cultural awareness of women’s leadership effectiveness during the COVID-19 crisis is pervasive.⁸³ The structural discrimination against women through inadequate child care

⁷⁹ U.N. WOMEN, GENDER EQUALITY, *supra* note 60, at 6.

⁸⁰ *Id.*

⁸¹ Sean Fleming, *These Countries Have the Most Expensive Childcare*, WORLD ECON. F. (Apr. 23, 2019), <https://www.weforum.org/agenda/2019/04/these-countries-have-the-most-expensive-childcare/> [<https://perma.cc/552N-Y4WP>].

⁸² Caroline Raines Greenfield, *Eliminating “Built-In Headwinds”: Strengthening the Military by Integrating the Condition of Pregnancy*, 45 HARV. J.L. & GENDER (forthcoming 2022).

⁸³ See, e.g., Uri Friedman, *New Zealand’s Prime Minister May Be the Most Effective Leader on the Planet*, THE ATLANTIC (Apr. 19, 2020), <https://www.theatlantic.com/politics/archive/2020/04/jacinda-ardern-new-zealand-leadership-coronavirus/610237/> [<https://perma.cc/HP6X-2RJB>] (noting the leadership acumen of New Zealand Prime Minister Jacinda Ardern).

policy is opportunity lost. Women have outpaced men in earning college degrees for approximately forty years and are set to outnumber men as college-educated workers in the labor force.⁸⁴ But the COVID-19 pandemic exposed a threat to this trend, as nearly nine hundred thousand women left the workforce at the start of the school year in September of 2020.⁸⁵ Prioritizing child care is likely to pay huge dividends by unleashing women's potential and assigning value to care work.

The United States' 2018 National Defense Strategy (NDS) acknowledges the global power competition with China and Russia and states in which the United States needs to integrate its diplomatic and economic prowess with its military might in order to compete.⁸⁶ The NDS recognizes that all domains, including "space[] and cyberspace[,]," are "contested."⁸⁷ Rapidly advancing new technologies, "includ[ing] advanced computing, 'big data' analytics, artificial intelligence, autonomy, robotics . . . and biotechnology," are changing the character of war.⁸⁸ The United States' strategic objectives include broadening influence, bolstering allies, and modernizing culture to optimize performance.⁸⁹ Increasing women's participation in public life fits the mold of these objectives. The historical parallel is the mobilization of women's economic participation during World War II and the temporary state-supported accessible and affordable child care facilities created for this effort.⁹⁰ The United States' adoption of the first-ever Women, Peace, and Security law in 2017 commits the United States to integrating women and gender-perspectives fully at all levels of security decision-making and practice.⁹¹ Comprehensive child care policy is an obvious step to reach those goals.

⁸⁴ Dani Matias, *New Report Says Women Will Soon Be Majority of College-Educated U.S. Workers*, NPR (Jun. 20, 2019), <https://www.npr.org/2019/06/20/734408574/new-report-says-college-educated-women-will-soon-make-up-majority-of-u-s-labor-f> [<https://perma.cc/GX26-V2P5>].

⁸⁵ Pallavi Gogoi, *Stuck-at-Home Moms: The Pandemic's Devastating Toll on Women*, NPR (Oct. 28, 2020), <https://www.npr.org/2020/10/28/928253674/stuck-at-home-moms-the-pandemics-devastating-toll-on-women> [<https://perma.cc/CQT2-MSCY>].

⁸⁶ See generally U.S. DEP'T OF DEF., SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2018), <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf> [<https://perma.cc/SF6X-9K75>].

⁸⁷ *Id.* at 3.

⁸⁸ *Id.*

⁸⁹ *Id.* at 4.

⁹⁰ Rhaina Cohen, *Who Took Care of Rosie the Riveter's Kids?*, THE ATLANTIC (Nov. 18, 2015), <https://www.theatlantic.com/business/archive/2015/11/daycare-world-war-rosie-riveter/415650/> [<https://perma.cc/2QMR-SWM3>].

⁹¹ Women, Peace, & Security Act of 2017, Pub. L. No. 115-68, 131 Stat. 1202 (codified at 22 U.S.C. §§ 2152j-2152j-4).

CONCLUSION

The United States should move to adopt Senator Elizabeth Warren's plan (or one like it) to align with its positive obligations to eliminate discrimination and enable women's equal participation in society. While the United States currently provides some protection against discrimination, the United States has failed to value caregiving responsibilities and enact policy that makes parenting compatible with success in public life. This disproportionately impacts and discriminates against women, especially minority women, and undermines the moral imperative of equality. Furthermore, it is unwise to structure a modern society to deny the most educated population segment full participation and to hamper those taking care of others in providing even for themselves.

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