

6-11-2013

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Joanna L. Grossman

*Maurice A. Deane School of Law at Hofstra University*

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## Recommended Citation

Joanna L. Grossman, *Seneca Falls Redux: New York's Governor Cuomo Pushes A New Law to Protect Women's Rights* Verdict (2013)

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# Verdict

June 11, 2013

[Joanna L. Grossman](#)

## Seneca Falls Redux: New York's Governor Cuomo Pushes A New Law to Protect Women's Rights



Last week, New York's Governor, Andrew Cuomo, proposed a bill to the state legislature entitled the **Women's Equality Act** (<http://www.scribd.com/doc/145676785/Gpb-9-Women-s-Equality-Act-Bill>) (WEA). It is a broad-based bill that is designed, in Cuomo's words, to "break down barriers that perpetuate discrimination and inequality based on gender" and to restore New York to "its role as a progressive leader on women's rights."

### Cuomo's Women's Equality Agenda: What is Equality In This Context?

When Cuomo first announced the Women's Equality Agenda, outlining the issues that would ultimately be tackled in a bill, he released a **promotional video** (<https://www.governor.ny.gov/2013/womens-equality>) featuring two babies, wrapped in identical hospital blankets and caps, with no telltale blue or pink to distinguish them. The narrator of the video promises that each baby will be raised by loving parents, who will provide for their basic needs, and each will be given the same opportunities for a good education. Each will attend the same schools and earn the same grades and diplomas. But then the narrator turns to a parade of horrors that one—and only one—of the babies will face. One of them is more likely to be the victim of domestic violence; more likely to be sex-trafficked; less likely to be paid fairly for work done; more likely to be sexually harassed; more likely to face housing and lending discrimination; more likely to be a single parent in poverty; and more likely to live out old age without sufficient means. And for many of these issues, the one baby is significantly more likely to experience the harm than the other.

The punch line, of course, is that the unlucky baby will face each of these disadvantages for just one reason—because she is a girl. The video uses the image of these otherwise identical infants to bring home the point that women are systematically disadvantaged relative to men, regardless of the circumstances of birth to which we might usually attribute different lives, like family, health, personal choice, and socioeconomic status.

The WEA embodies the notion of substantive equality, which dictates that we measure equality by outcomes. We ask whether men and women able to capitalize equally well on their natural talents and capacities rather than have they been subjected to formally equal rules? By comparing these two babies who start out on equal footing, and who yet end up in drastically different places as adults, the Cuomo agenda argues for a shift in the

way we think about women's equality. It works backwards from the unequal adult outcomes to determine what along the way might have caused those two babies' paths to diverge so dramatically.

## A Platform of Demands: Harkening Back to Seneca Falls

In 1848, a group of feminists convened in Seneca Falls, New York and issued a document that signaled the birth of the women's movement. Their Declaration of Sentiments condemned a wide range of "injuries and usurpations on the part of man toward woman"—everything from withholding the right to vote, to applying different codes of moral conduct—and demanded "immediate admission to all the rights and privileges which belong to them as citizens of the United States." Formal citizenship status was the basis for demanding the substantive rights that full citizens enjoy—a broad spectrum of political, personal, and civil rights ranging from suffrage to child custody to property ownership. The convention, and the document it produced, laid the groundwork for decades of advocacy that has been undertaken in the name of women's equal citizenship.

In announcing and urging passage of the new bill, Governor Cuomo invoked the history and spirit of Seneca Falls. "From that moment in time and continuing through today," he wrote, "the state has been the home of female leaders and visionaries . . . [who] served as role models for not only their generation but for every generation to come." But despite this tradition of women's rights advocacy, his supporting memo claims that women are still not equal to men. "Study after study," the memo contends, "shows gender inequality in our communities."

Like the Seneca Falls platform, the WEA is structured as a wide-ranging list of demands. It proposes changes to the law in ten different areas, each calculated to bring about greater gender equality—to equalize the lives those two babies will have.

## The Women's Equality Act: Nuts and Bolts

The proposed changes, and the circumstances that justify them, are as follows:

- **Pay Equity:** The bill would amend the state's equal pay law in three ways calculated to reduce the existing gender wage gap. First, it would narrow the scope of an affirmative defense that allows employers to justify pay differentials based on any factor other than sex, an exception that is so broad as to defeat the requirement of equal pay in many cases. It would also expand the pool of comparators for purposes of proving equal-pay violations to include those working for the same employer, but at a different physical location. Second, the bill would forbid employers from insisting on pay secrecy—a practice that is disallowed by the National Labor Relations Act, but widely practiced nonetheless, and which makes it difficult for women to learn that they are the victims of pay discrimination. Third, the law provides for greater damages for proven equal-pay violations. These proposed changes are necessitated by the entrenched wage gap and the difficulty that women have in learning about, challenging, and receiving recompense for pay discrimination. (The pay equity problem is detailed [here](http://verdict.justia.com/2012/04/17/the-lady-in-red) (<http://verdict.justia.com/2012/04/17/the-lady-in-red>).)
- **Sexual Harassment:** The bill would apply existing sexual harassment prohibitions (embodied in the general ban on sex discrimination) to all employers, not just those with five or more employees, as provided under current law. The problem of sexual harassment is still widespread despite decades in which there has been robust legal protection under both state and federal law. There is no easy fix for the problem, but the bill's move to cover smaller employers—which are more than 60% of the state's private employers—is a step in the right direction. (One might get the flavor of the problem of sexual harassment today by reading about this [recent New York case](http://verdict.justia.com/2012/10/30/hands-off-the-merchandise) (<http://verdict.justia.com/2012/10/30/hands-off-the-merchandise>).)
- **Lending Discrimination:** The bill would provide for attorneys' fees in cases where plaintiffs prove employment or credit discrimination (including those brought before the Department of Financial Services, rather than in court) on the basis of sex and would retain the possibility of such fees in housing and housing credit cases. This change is motivated by the concern that victims of discrimination have a hard time finding lawyers to represent them because of the uncertain payoff, and that plaintiffs fare poorly when they hire lawyers to work on contingency (rather than for hourly fees). This change will make it more likely

that victims of discrimination will have greater access to justice.

- **Family Status Discrimination:** The bill would add “familial status” to the list of protected characteristics upon which employers cannot discriminate. With this change, New York joins a small but growing number of states that understand that wives and mothers face unique types of discrimination in the workplace based on stereotypes about their unreliability, lack of competence, or lack of labor-force commitment. Studies document that mothers suffer significant wage penalties and unfair employment decisions as a result of the application of such stereotypes. This is particularly troubling given the number of single mothers who live in poverty and cannot afford to lose their jobs or to be paid less than they are worth. (An analysis of federal law and policy regarding caregivers is available [here](http://writ.news.findlaw.com/grossman/20090512.html) (<http://writ.news.findlaw.com/grossman/20090512.html>).
- **Domestic-Violence Discrimination:** The bill would also prohibit landlords from discrimination against potential tenants either because of domestic violence victim status, or because their source of income comes from government vouchers, rather than wages or some other private source. This change is designed to decrease the likelihood that a victim of domestic violence will stay in a dangerous situation because she lacks access to other housing.
- **Protection from Domestic Violence:** The bill would require that courts provide interpreters to translate orders of protection into the appropriate language, and would make clear that the party who seeks the order of protection cannot be held to violate it. The bill would also allow for the creation of a pilot program for remote petitioning of temporary orders of protection for women who do not have ready access to a court. This bill reflects continuing frustration with accessibility to and enforcement of domestic violence protection orders. These changes, although minor, would improve the protection available under state law.
- **Sex Trafficking:** The bill would make several changes to the criminal code to provide greater protection against sex trafficking. Among other changes, the bill proposes expanding the definition of trafficking to encompass more offenders, increasing the severity of penalties for trafficking convictions, and creating an affirmative defense to prostitution prosecutions when the defendant was a victim of sex trafficking. New York already has one of the strongest anti-trafficking laws in the country, but these changes will make it stronger still.
- **Pregnancy Discrimination:** The bill mandates that employers must provide reasonable accommodation to employees with pregnancy-related disability unless doing so would result in undue hardship. This change is incredibly important, given the number of pregnant women who seek (indeed, need) to continue working throughout pregnancy, but require often minor accommodations because of the physical effects of pregnancy. Although the federal Pregnancy Discrimination Act (PDA) purports to provide some protection, at least when employers offer accommodations to other temporarily-disabled workers, federal courts in recent years have narrowed and weakened the PDA’s protection, leaving many pregnant women vulnerable to job loss during the time when they can least afford it. A handful of states have passed reasonable accommodation laws such as this one, and New York would be dramatically increasing women’s access to equality by passing such a law. (A history of pregnancy discrimination law and the need for new protection is explained [here](http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act) (<http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act>).
- **Abortion:** The bill would codify the standard set forth in *Roe v. Wade*, the U.S. Supreme Court case that first held a woman’s right to terminate a pregnancy is constitutionally protected, into New York law. While this portion of the bill would provide no new rights, it would make clear that New York will not join the dozens of other states that have curtailed women’s access to legal abortion in recent years, some in dramatically unconstitutional fashion. (I have written about this disturbing trend [here](http://verdict.justia.com/2013/04/02/whats-the-matter-with-north-dakota-and-arkansas) (<http://verdict.justia.com/2013/04/02/whats-the-matter-with-north-dakota-and-arkansas>)). Without a doubt, this will be the most controversial aspect of Cuomo’s 10-point plan.

## Conclusion

In sum, Governor Cuomo should be lauded for calling attention to the broad and persistent problem of gender inequality. Although bills on many of these individual subjects have been introduced in the New York legislature in recent years, they have often languished, in part due to a lack of an appreciation of their collective impact and importance. By attacking ten issues at once, Cuomo draws attention to the issue of gender equality, and makes it more likely that legislators will act. As the supporting memorandum concludes, this is a budget-neutral bill, despite its broad call for changes to the law. If equality is free, shouldn’t we seize it?



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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