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ARTICLES

HE SAYS, SHE ASKS: GENDER, LANGUAGE, AND THE LAW OF PRECATORY WORDS IN WILLS

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"I don't mind living in a man's world as long as I can be a woman in it." Marilyn Monroe (1926-1962)[2]

I. INTRODUCTION

Would trust law fail Marilyn Monroe?

On August 5, 1962, Marilyn Monroe (born Norma Jeane Baker) died leaving a valid will.[3] Her will was probated in New York and was admitted for ancillary proceedings in California in January of 1963.[4] Marilyn's will

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2. Marilyn Monroe's Official Website, http://www.marilynmonroe.com/about/quote_by.html (last visited May 24, 2006).

3. Strasberg v. Odyssey Group, Inc., 59 Cal. Rptr. 2d 474 (Cal. Ct. App. 1996).

4. *Id.* at 475.

provided for certain friends and family members and included a demurely worded bequest to Lee Strasberg, her acting coach and close companion.[5] Marilyn directed in her will that Strasberg was to receive her personal effects and clothing, as well as the residue of her estate, "or if he should predecease me, then to my Executor hereinafter named, it being my desire that he distribute these, in his sole discretion, among my friends, colleagues[,] and those to whom I am devoted."[6]

Marilyn's words, although expressive and thoughtful, are in all likelihood legally impotent. Marilyn's "*desire*" regarding the distribution of her personal effects is manifestly uncertain to be enforced under standard tenets of trust law.[7] An individual can create a legally enforceable trust where there is a separation of legal and equitable interests,[8] ascertainable beneficiaries,[9] a trust res,[10] and intent to create a trust.[11] A person's language is often judged to show lack of intent—meaning that no trust is created—when he or she uses "precatory language": words of preference or guidance rather than explicit direction.[12] When a donor uses precatory language falling short of binding words that create a trust, the recipient of the property is not bound as a trustee; instead, the recipient is merely on his or her honor to follow the donor's wishes—or not.[13]

In Marilyn's case, Strasberg never distributed any of her personal effects to the friends or colleagues to whom Marilyn was devoted.[14] In fact, Strasberg requested the return of several of Marilyn's possessions that she had given to a colleague.[15] When Strasberg died, he left a will granting Marilyn's personal effects to his wife.[16] Mrs. Strasberg, like her husband, chose not to submit to

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5. *Id.*

6. *Id.* at 475-76 n.1.

7. *See* 1 GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES ch. 3, § 48, at 78 (2d ed. rev. 1984).

8. In other words, there must be a trustee (although a court will appoint one if the settlor fails to name a trustee). *See* RESTATEMENT (THIRD) OF TRUSTS §§ 31, 34 (2003).

9. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 485-93, 98-99 (7th ed. 2005). Attentive scholars of trust law will also note that this bequest would be unenforceable for lack of ascertainable beneficiaries. *See id.* For purposes of this illustration, however, it is the precatory language that is our central concern.

10. *See* RESTATEMENT (THIRD) OF TRUSTS § 44 (2003).

11. UNIF. TRUST CODE § 402(a)(2)(2000).

12. *See* BLACK'S LAW DICTIONARY 1214 (8th ed. 2004) (defining "precatory" as "requesting, recommending or expression or desire for action but usually in a non-binding way.").

13. *See generally* Frank L. Schiavo, *Does the Use of "Request," "Wish," or "Desire" Create a Precatory Trust or Not?*, 40 REAL PROP., PROB. & TR. J. 647 (2006) (providing historical analysis of the weight given to precatory words by various jurisdictions).

14. Strasberg v. Odyssey Group Inc., 59 Cal. Rptr. 2d 474, 476 (Cal. Ct. App. 1996).

15. At Lee Strasberg's request, Inez Melson returned Marilyn's green sequined gown, flesh colored gown, full-length white beaver coat, and Rodin statue to Mr. Strasberg. *Id.*

16. *Id.*

Marilyn's "desire."[17] While Mrs. Strasberg has donated a few of Marilyn's items to be auctioned or displayed to benefit charity, she has not transferred any of Marilyn's property to any of Marilyn's friends or colleagues.[18]

One might conclude that the law failed Marilyn.[19] Did Marilyn believe that Strasberg would be bound to distribute her items as she stated? Or did she intend to leave it to his discretion, comfortable with the possibility that her property would not end up in the hands she imagined? It is hard to tell what Marilyn intended or believed. It is easier to tell what she created: a communication regarding her desires for the disposition of her property at death that is uncertain to be respected. Why did Marilyn choose to express herself in her will the way that she did? How much of the legal effect of Marilyn's will was a consequence of the language she chose? How much of the language she chose was a result of her sex?[20]

The language people choose is critical in determining the legal effect of documents. In wills and trusts, the use of "precatory language" may render the direction given unenforceable.[21] Although many courts attempt—to varying degrees—to take into account the totality of the circumstances surrounding a conveyance to determine whether the donor intended a trust or not,[22] using precatory language rather than direct expressions of intent to create a trust submits the instrument to judicial scrutiny that is at best uncertain to divine the donor's true intentions.[23]

The language people choose is related both to hard science and social science and is connected to whether the speaker is male or female. Psychologists have established that women may speak "in a different voice" than men.[24] Awareness of this tendency in communication is not limited to those holding advanced degrees in psychology.[25] Popular books such as John

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17. *Id.*

18. *Id.*

19. For an argument that Strasberg's behavior may comply with the spirit of Marilyn's request if not the letter, see the discussion in JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES: TEACHER'S MANUAL (7th ed. 2005) at 8-18.

20. Marilyn prized herself on her femininity and often justified her actions with reference to her feminine nature. *See The Real Marilyn*, MS. MAGAZINE, Aug. 1972, at 40, 41. The article features a compilation of quotes by Marilyn, including one in which she explained her decision to decline a role in the movie *Good-bye Charlie*, "I don't like the idea of playing a man in a woman's body—you know? It just doesn't seem feminine." *Id.* In the same article, Marilyn quipped, "I've found out it's fun to go shopping. It's such a feminine thing to do." *Id.*

21. *See* BOGERT & BOGERT, *supra* note 7, § 48.

22. *See, e.g.*, Knisely v. Simpson, 74 N.E.2d 695, 698 (Ill. 1947).

23. *See, e.g., In re* Sowash's Estate, 217 P. 123, 126 (Cal. Ct. App. 1923).

24. *See generally* CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

25. A recent article in *Cosmopolitan Magazine* (which followed an informative exposé on *Cosmo's Aqua Kama Sutra*) informed readers that "bonding with your man means getting your communication styles in sync." Colleen Rush, *Guy Talk vs. Girl Talk: The Secret to Really Understanding Each Other*, COSMOPOLITAN MAGAZINE, June 2006, at 142. For an

Gray's[26] *Men are from Mars, Women are from Venus*[27] thrust gendered language into the mainstream. *Men are from Mars* sets forth the theory that men and women communicate differently, in part because women use language to express feelings whereas men use language to express information.[28]

Assuming that the connection between language and law and the connection between language and gender are both established, where does that logically lead? All three—gender, language, and the law—are intimately interconnected. This Article explores this relationship and examines the influence that the gendered use of language in a will has on the enforceability of those directions.

Part II of this Article will begin with a discussion of precatory language and establish the connection between language and law in the context of wills. Next, Part III will examine psychological scholarship and research to establish the connection between language and gender. Having made these two connections, Part IV of the Article will progress to their interrelationship: the link between gender, language, and law. In the area where these three fields overlap, the Article will analyze original empirical evidence demonstrating the important role gender plays in the language people use in legal documents. Finally, in Part V, the Article will conclude by suggesting the implications that our heightened understanding of gender and precatory language has for courts, legal scholars, and practicing attorneys.

If gender plays a substantial role in what language a man or woman uses, should a court base a decision on whether a document is legally binding upon the words the man or woman chose for the document?[29] The discussion begins by examining the extent to which the language a man or woman chooses impacts the enforceability of directions given in a will.

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example of other highbrow mainstream communications, see RANA ADAMCHICK, THE MALE DILEMMA: A WOMAN'S SECRET LANGUAGE EXPOSED at http://www.cyberread.com (2006). The book is popular for its dictionary format, which actually translates female speech into terms males can understand.

26. John Gray, expert on communication in relationships, is not to be confused with John Chipman Gray, expert on the Rule Against Perpetuities, although both authors have generated excellent beach reads.

27. JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1992). A modern offshoot of this popular book is the website, Relationship Advice from Men are from Mars, Women are from Venus, http://www.marsvenus.com (last visited May 24, 2006) (discussing relationship advice, relationship coaching, matchmaking guidance, and offering merchandise).

28. GRAY, *supra* note 27, at 60.

29. The question of who is choosing the language—the testator or the drafting attorney —is an important one. *See* discussion *infra* Part IV. At the outset, it is critical to note that many individuals draft their own wills without the assistance of an attorney (over a third of the testate subjects included in the empirical research in this Article had self-drafted wills) and that self-drafted wills are more likely than professionally-drafted wills to raise issues of ambiguous language. Clearly, the question of whose voice is used in expressing the testator's plan is simpler when an attorney is not involved as an intermediary.

II. LANGUAGE AND LAW: PRECATORY LANGUAGE

A. *Introduction*

A trust is a powerful tool for promoting the intention of the person who establishes it. A person creates a valid express trust when he or she has "a present power of disposition over definable property [and] reposes the legal ownership to that res in another for the beneficial use of a third person."[30] In other words, a trust separates legal title from equitable title and grants powers to a trustee to manage property for the benefit of a beneficiary.

The cornerstone of wills and trusts law is to discern and respect the intentions of the donor.[31] Although extrinsic evidence is permitted to enlighten courts as to the donor's intentions in certain cases,[32] the court's construction begins, and often ends, with the words themselves.[33] It is the donor's expressed intention, as reflected in the language of the document, that the courts seek to enforce. A court cannot know the secret intentions of a donor's mind, and the ideal of donor intent is an ideal only.

Trusts are created by the expression of language; they may be oral but are generally written.[34] One might hope that when a man or woman uses language to create a legal structure imposing fiduciary obligations on one party for the benefit of another, he or she would select that language carefully and deliberately. Not everyone takes such care.

When a donor uses precatory language, he or she descends into a legal no-man's-land, in which the instructions may be enforceable or may be disregarded. Unlike direct and explicit trusts which are enforced according to their terms, grants using precatory language must submit to a variable and unpredictable court analysis regarding whether the language was backed by intent to create a trust.[35]

In some cases, it may be difficult for the interested parties (would-be trust beneficiaries and alternate takers) to determine whether a trust has been created by the language the donor used. In these cases, courts must construe the language in light of the relevant facts and circumstances to determine whether

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30. Penney v. White, 594 S.W.2d 632, 639 (Mo. Ct. App. 1980); *see also* BOGERT & BOGERT, *supra* note 7, §1 at 1-2; 90 C.J.S. *Trusts* § 17, at 140-41 (2002).

31. As Chief Justice Marshall wrote in *Smith v. Bell*, 31 U.S. (6 Pet.) 68 (1832), "The first and great rule in the exposition of wills, to which all other rules must bend, is, that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law."

32. Courts may look to extrinsic evidence in cases of latent or patent ambiguity. *See* DUKEMINIER & JOHANSON, *supra* note 9, at 369-71.

33. RESTATEMENT (THIRD) OF TRUSTS § 13 cmt. d (2003) lists factors a court should consider when determining whether a trust has been created.

34. Some limitations on oral trusts include potential violations of the statute of frauds and reluctance to enforce secret or semi-secret trusts. *See* DUKEMINIER & JOHANSON, *supra* note 9, at 538.

35. *See* Schiavo, *supra* note 13, at 661.

the "donor" intended to create an enforceable trust or merely to provide non-binding guidance as to his or her preferences.[36] This non-binding language is known as precatory language.[37]

B. *The Meaning of Precatory Language*

What do we mean by "precatory language"? Black's Law Dictionary defines precatory words as "words of entreaty, request, desire, wish, or recommendation, employed in wills, as distinguished from direct and imperative terms."[38] Precatory words used in a will "ordinarily import entreaty, recommendation, or expectation, rather than any mandatory direction."[39] When language is "advisory" rather than "mandatory," the direction does not establish a trust, but rather it establishes a gift that is conditional on the holder of the property (often the executor) exercising his or her discretion.[40]

What words are precatory? A California court explained that "[p]recatory words are expressions by a settlor of desire, wish, recommendation, assurance, request, or the like."[41] Late professor and trust expert George Gleason Bogert agreed that "[t]he words 'request,' 'desire,' and the like, do not naturally import to most persons a legal obligation."[42]

How much does the language chosen matter? This is a fair question, and perhaps not an obvious one to ask. After all, the choice of precatory words does not render the finding of a trust impossible. As Bogert puts it, "The use of any particular precatory word will not be of much influence in determining the question of intent."[43] For example, although there are several cases holding that when a donor states that he or she "wishes" for a certain outcome, there is no trust,[44] other cases have held that the use of the word "wish" can create a trust.[45] So perhaps one might conclude that the language chosen does not have a significant impact.

The flaw with this conclusion is that it overlooks the alternative treatment given to nonprecatory language. While a court might, after a detailed subjective analysis, find a trust in spite of precatory language, explicit trust

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36. *See, e.g., In re* Hood's Estate, 135 P.2d 383, 385 (Cal. Dist. Ct. App. 1943).

37. *See* BLACK'S LAW DICTIONARY 1214 (8th ed. 2004).

38. *Id.* at 1551. Black's defines "precatory trust" as "the trust that the law will recognize to carry out the wishes of the testator even though the statement in question is in the nature of a recommendation rather than a positive command." *Id.*

39. 9 SUMM. PA. JUR. 2D., PROBATE, ESTATES, AND TRUSTS § 3:33, at 222-23 (2006).

40. 6 TEX. FAM. L. SERV. § 48:53 (2006).

41. *In re* Farrelly's Estate, 4 P.2d 948, 950-51 (Cal. 1931).

42. *See* BOGERT & BOGERT, *supra* note 7, § 48 at 74. Bogert also acknowledges that a legal obligation "may be shown by other portions of the instrument or by extrinsic evidence." *Id.*

43. *Id.* at 80.

44. *See, e.g.*, Sears v. Cunningham, 122 Mass. 538 (1877); Phillips v. Phillips, 19 N.E. 411 (N.Y. 1889).

45. *See, e.g., In re* Hellman's Estate, 266 N.W. 36, 39-40 (Iowa 1936).

direction should result in an automatic finding that a trust has been created.[46] Furthermore, the strength of the language used is apt to be the determining factor, in the absence of special circumstances.[47] The language a man or a woman chooses to use in a will, and the legal implications of that language, are critical.

So we turn then to the development of law regarding precatory language and its modern application. Over time, courts have followed one of two main rules. The original rule was easier to apply, but perhaps inconsistent with the true intent of the donor. The modern rule, while far more sympathetic to donor intent, is of little predictive value in determining whether a court will find a trust to exist. The following sections will trace the development of the law of precatory language leading to the muddled path we have today.

C. *The Development of Law Regarding Precatory Language*

For the most part, precatory language is a creature of common law.[48] Most states look to case law to describe and define the doctrine. Although it is possible—perhaps even preferable—to codify the law of precatory language in a statute, the vast majority of American states have not done so.[49] For the most part, therefore, our discussion of the law of precatory language will review cases from various jurisdictions, starting with England.

1. The Early Rule: Precatory Words are Powerful

England integrated the concept of precatory trusts into its law and held in early cases that precatory language and direct language were equally enforceable. Words such as "desire," "will," or "in confidence that" were judged to create binding trusts, often without any concern that the soft language might indicate a lack of intent to create a trust.[50]

In *Harding v. Glyn*, a male testator granted property to his wife, but "desired" that upon or before her death, she give the property to such of his relatives that she thought most deserving. [51] The question arose as to whether

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46. We assume here, of course, that there are no shortcomings relevant to the other elements necessary for a trust (including trust property and separation of legal and equitable title).

47. *See* BOGERT & BOGERT, *supra* note 7, § 48 at 78-88.

48. Precatory trusts can be traced to Roman law. *See* Bd. of Foreign Missions of United Presbyterian Church v. Culp, 25 A.117, 118 (Pa. 1892).

49. Georgia has codified its law on precatory language. GA. CODE ANN. § 53-12-21(b) (1997).

50. *See, e.g.*, Harding v. Glyn, (1739) 26 Eng. Rep. 299, 300 (Ch.).

51. *Id.* at 299. *See also* Brown v. Higgs, (1800) 31 Eng. Rep. 700, 703 (Ch.) (citing *Harding v. Glyn* as precedent and relying upon it for its holding). In *Brown v. Higgs*, a testator left his wife property associated with their home "but did desire her at or before her death" to transfer or lease the property to "such of his own relations as she should think most deserving and approve of." *Id.* The court noted that the distinction between a trust and a power (to appoint) was "very nice" and expressed some difficulty reaching the conclusion in

the wife held the property outright or in trust.[52] The court pointed out that "it is clear the wife was intended to take only beneficially during her life; there are no technical words in a will, but the manifest intent of the settlor is to take place, and the words *willing* or *desiring* have been frequently construed to amount to a trust."[53] The court further noted, "It seems, that any words of a testator intimating a *request, wish, desire, recommendation, [etc.]*, are sufficient to create a trust," provided that the gift and the object to be benefited are certain.[54] The court held that the language created a trust binding upon the wife.[55]

In *Eeles v. England,* a female testator left her uncle a sum of money but noted her "will and desire" that the uncle pass along the cash to his daughter (the testator's cousin) at or before her uncle's death. [56] The uncle died eight days before the testator and his daughter died shortly thereafter; the daughter's administrator sought an interest in the testator's estate.[57] The court noted that "it was admitted, that the words I desire, or I will, amount unto an express devise" and held that the daughter's estate was entitled to the funds.[58]

This rule persisted into the nineteenth century. In *Cruwys v. Colman,* a female testator left property to her sister, noting that it was her "absolute desire" that the sister convey the property to that sister's family at her death.[59] The court considered the language in this will to be stronger than some cases in which a trust was found, but noted that it "does not make a difference" whether the language is stronger or weaker, so long as the subject and objects of the trust are certain.[60] The court found the language to be sufficient to create a trust and executed a trust in favor of the sister's family (the sister having failed to designate family members in her will).[61]

There were, however, occasional cases in which a trust was not found when the testator used precatory language. In *Wright v. Atkyns*, a son left his mother all of his real property, "in the fullest confidence that after her decease she will devise the property to my family."[62] A question arose as to whether the mother could cut and sell timber on the land as an outright owner, or whether she held some portion of the value of the property in trust for her son's

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the present case. *Id.* at 705-06. Despite the court's "considerable difficulty" with the issues, the court found that there was, indeed, a trust created by the will. *Id.* at 706.

52. *Harding*, 26 Eng. Rep. at 299.
53. *Id.*
54. *Id.* at 300.
55. *Id.*
56. (1704) 23 Eng. Rep. 901, 901 (Ch.).
57. *Id.*
58. *Id.*
59. (1804) 32 Eng. Rep. 626, 626 (Ch.).
60. *Id.* at 626-27.
61. *Id.* at 628.
62. (1823) 37 Eng. Rep. 1051, 1051 (Ch.).

kin.[63] The court held that the mother should be treated as a tenant in fee (outright owner of the property) and entitled to cut the timber for her own benefit.[64]

Early cases in America were consistent with the predominant English view that precatory language should be enforced as a trust. Rather than requiring a direct or explicit instruction that property was to be used in a particular manner or held for an individual's benefit, more polite and vague language was held to create a legally binding trust.

In *Ingram v. Fraley*, a male testator explained his bequest of his entire estate to a friend, using soft and polite terms.[65] The testator had "utmost confidence" that the friend "will entirely carry out my wishes and desires, as they may be expressed to him by me," and knew that the friend would "be able much more effectually to dispose of my estate, as I wish it done, than I could at this time do myself, and with much less trouble to himself."[66] Despite some confusion as to whether the terms of the trust were properly declared, the Georgia Supreme Court held that the language was sufficient to dictate that the friend held the property as trustee and not as beneficial owner.[67] The Court noted the argument that perhaps English law ought not apply in Georgia, but judged the English rule to be "sound and sensible" and applied it.[68] The weakness of the language ("desirous," "confidence," "wishes and desires") did not interfere with the testator's presumed intention to create a trust.[69]

In *Presbyterian Board of Foreign Missions v. Culp*, a testatrix granted land to her mother, but followed the granting language with a clause including a "direct expression of desire" that the property be appropriated to missionary

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63. *Id.* at 1056.

64. *Id.* at 1059.

65. 29 Ga. 553 (1859).

66. *Id.* at 553. The will provided, in relevant part,

> Owing to the peculiar condition of my property, and being desirous of keeping my negroes together, as long as it can be done; and having the utmost confidence in the integrity of my long tried friend, William Fraley, of said county, and that he will entirely carry out my wishes and desires, as they may be expressed to him by me, either verbally or in writing; and knowing that my said friend will, by this will, be able much more effectually to dispose of my estate, as I wish it done, than I could at this time do myself, and with much less trouble to himself, I hereby give to the said Fraley my entire estate, real and personal, notes and other debts due me, money and property of every kind.

Id.

67. *Id.* at 557.

68. *Id.* at 558-59.

69. The court explained that "[a]mong the negroes on the plantation, were a family of mulattoes, to which testator, for reasons not necessary to be repeated, had a strong affection . . . ." *Id.* at 555. This evidence supported the court's conclusion that a trust was intended, and the court noted that "it is not an uncommon thing for our people to cherish a strong affection for their negroes" and "a trust may have been contemplated for the benefit of the slaves themselves." *Id.* at 561.

purposes after the mother's death.[70] The court held that this language created a binding trust and that the mother had a life estate only.[71]

In *McRee's Administrators v. Means*, Martha Ann McRee died owning considerable property associated with her cotton plantation.[72] Ms. McRee left a will granting the remainder of her property to her husband, but if he should die without issue of his body, "it is my wish and will he shall give all of said property to Robert P. Means."[73] The court found this language sufficient to create a binding trust, but acknowledged that the word "will" was stronger than the word "wish."[74] Although finding in favor of a trust, this case perhaps signaled a transition to a rule in which not all polite requests would be honored.

2. The Transitional Rule: Precatory Words are Weakened

Although under early law speaking softly carried as big a stick as explicit trust language, this rule for the meek did not last in England or the United States. Justice Ross, an English judge commenting on the state of affairs in the early twentieth century, remarked, "When we come to consider the innumerable decisions in which the Courts of equity have displayed their benevolent astuteness in imposing an obligatory meaning upon words merely expressive of desire, the mind is reduced to a condition of perplexity and confusion . . . ."[75] Although Justice Ross found it "quite impossible to reconcile the cases," he noted that "there is no doubt that the tide has turned and is running strong against precatory trusts."[76]

The early part of the twentieth century marked a time of transition for most American states where the default rule of finding a trust gave way to a more variable analysis that often concluded that no trust existed. In *Knox v. Knox,* a court found a valid trust when the male donor used precatory language but acknowledged the trend toward discounting the "strength of precatory words."[77] In *Knox*, a male testator left his entire estate to his wife, "having full confidence in my said wife, and hereby request that at her death she will divide equally between my sons and daughters all the proceeds of my said property, real and personal, hereby bequeathed."[78] The court held that the widow was entitled only to a life estate, with the remainder to be held in trust for the children.[79] Although the court found a trust here, it acknowledged the

70. 25 A. 117, 118 (Pa. 1892).
71. *Id.* at 119.
72. 34 Ala. 349 (1859).
73. *Id.* at 364.
74. *Id.* at 365-68.
75. *In re* Estate of Humphrey, [1916] 1 I. R. 21, 24 (Ch. Div.) (Ire.).
76. *Id.*
77. 18 N.W. 155, 159 (Wis. 1884).
78. *Id.*
79. *Id.* at 158.

departure from classic English cases finding precatory words to be as compelling as more "technical language."[80] Justice Taylor explained:

> While, on the one hand, we are inclined not to go to the extent of the older cases in England and in this country, in establishing trusts upon the strength of precatory words used by a testator in his will, on the other, we are not disposed to repudiate the whole doctrine of such trusts.[81]

The court instead struck a middle ground:

> We are disposed to apply the doctrine only in cases where it is clear that, on the whole, it was the intention of the testator to create such trust by the use of such words, and where the words used show with reasonable certainty that the testator intended to control the legatee or deviser in the use and control of the property devised or bequeathed.[82]

The highest court of Massachusetts also acknowledged the transition from treating precatory words as equals with technical language to requiring closer scrutiny, this time holding that a trust did not exist. In *Aldrich v. Aldrich*, a male testator left his entire estate to his wife, stating "I am confident she will manage with good discretion and fidelity what is committed to her, and that, when she shall no longer need the property, it will be equally divided among our dear children or their representatives."[83] The court noted that there was "nothing which renders it obligatory on her" to comply with the direction and therefore no trust had been created.[84] The court explained:

> If the testator had intended to create a trust in favor of his children at his wife's death, there can be no doubt that he knew how to do it in clear and unmistakable terms; and it is almost inconceivable that, if such was his purpose, he should have expressed himself in the manner in which he has done. There is no doubt that words of recommendation, or of confidence, entreaty, hope, or desire, have been held sufficient under some circumstances to create a trust. But, speaking generally, this was because in such cases such a construction was supposed to carry out the intention of the testator. If an arbitrary rule seems to have been laid down at one time in regard to what would constitute a precatory trust, there can be no

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80. *Id.*
81. *Id.* at 159.
82. *Id.*
83. 51 N.E. 449, 450 (Mass. 1898).
84. *Id.*

> doubt, we think, that the tendency of later decisions has been, if not to relax the rule thus laid down, at least not to extend it.[85]

The Maryland court applied this doctrine in *Pratt v. Trustees of Sheppard*, in which a male testator's "wish and will" did not create a trust.[86] The court stated:

> Whatever may have been the results reached in the earlier cases on this subject, there is a strong tendency nowadays to restrict the doctrine of precatory trusts within more reasonable, and somewhat narrower, bounds than formerly . . . .
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> . . . .
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> If there be one thing settled on this subject of the effect of precatory words, it is that such words are not always imperative.[87]

Cases in other states also acknowledged the transition in the rule.[88] One California court commented on the transition between the default rules regarding whether a trust was established by precatory language:

> [T]he early English rule, which has been followed to some extent in the courts of this country, held that mere precatory expressions were deemed to raise a trust unless it appeared from the context to be to the contrary. In other words, the use of precatory words was held to create a presumption that a trust was intended. This rule, it is explained, is based upon the historical fact that all trusts, no matter how expressed, were only of precatory force, and imposed no binding obligation. The other rule, which is based upon later English cases and most of the American cases, reverses this presumption, and holds that mere precatory expressions are presumptively indicative of nothing more than request or expectation, unless the context, or the circumstances surrounding the testator at the time of the making of the will, show that the testator intended to create a trust and to leave the legatee no option in the matter.[89]

After examining the two approaches, the California court concluded that the modern rule was the sounder one.[90] Applying this rule, the court found no trust.[91]

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85. *Id.*

86. 42 A. 51 (Md. 1898).

87. *Id.* at 54-55.

88. *See, e.g.*, Burnes v. Burnes, 137 F. 781, 794-95 (8th Cir. 1905); Bryan v. Milby, 24 A. 333, 334 (Del. Ch. 1891); Igo v. Irvine, 70 S.W. 836, 837 (Ky. Ct. App. 1902); Ryder v. Myers, 167 A. 22, 23, (N.J. Ch. 1933), *aff'd*, 169 A. 691 (N.J. 1934).

89. *In re* Lee's Estate, 284 P. 948, 949 (1st Cir. 1930).

90. *Id.*

Whereas the early rule on precatory language was "there is a trust," the rule transitioned to "there is not a trust, unless . . . ." Precatory language does not in itself negate a trust, but mere precatory language will not create a trust unless other facts and circumstances demonstrate an intent to do so.[92] The modern test is summarized by an American Law Reports annotation, which notes that the critical test is whether the desire expressed by the testator "is meant to govern the conduct of the one to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of such person, leaving it, however, to the person to exercise his own discretion."[93] If the testator leaves a bequest paired with words that allow the recipient "free to act or not to act, such words are to be treated as an appeal to the conscience and affections of the legatee, and nothing more."[94]

The *Restatement (Second) of Trusts* offers similar guidance and fleshes out additional criteria a court should use in determining whether a trust exists based upon precatory language. The Restatement explains that "[n]o trust is created unless the settlor manifests an intention to impose enforceable duties,"[95] and in limited cases, precatory language may manifest this intention.

> *Precatory words.* On the one hand, the settlor may manifest an intention to create a trust; on the other hand, his manifestation of intention may amount merely to a suggestion or wish that the transferee should use or dispose of the property in a certain manner, leaving it to the transferee to follow the suggestion or comply with the wish only if the transferee desires to do so. No trust is created if the settlor manifests an intention to impose merely a moral obligation. In determining the intention of the settlor the following circumstances among others are considered: (1) the imperative or precatory character of the words used; (2) the definiteness or indefiniteness of the property; (3) the definiteness or indefiniteness of the beneficiaries or of the extent of their interests; (4) the relations between the parties; (5) the financial situation of the parties; (6) the motives which may reasonably be supposed to have influenced the settlor in making the disposition; (7) whether the result reached by construing the transaction as a trust or not a trust would be such as a person in the situation of the settlor would naturally desire to produce.[96]

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91. *Id.*
92. *See* Annotation, *Precatory Trusts*, 49 A.L.R. 22-26 (1927).
93. *Id.* at 23-25.
94. *Id.* at 26.
95. RESTATEMENT (SECOND) OF TRUSTS § 25 (1959).
96. *Id.* at § 25 cmt. b.

The already nuanced rule of precatory language is even more nuanced in certain jurisdictions.[97] When a court attempts to determine whether a trust has been created under all of the surrounding circumstances, despite the use of precatory language, the court may consider to whom the words were addressed.[98] California has contended that "an expression of desire on the part of a testator [was] a mere request when addressed to his devisee but [was] to be construed as a command when addressed to his executor."[99] Kentucky also has viewed a "desire" expressed to a trustee as binding.[100] Missouri, however, has held that a "request" directed to a trustee was not binding.[101] Similarly, North Carolina has found that a "request" made of an executor was not binding.[102]

Illinois has given particular weight to whether the language was addressed to someone with whom the testator had an intimate relationship, such as his widow.[103] Likewise, in *Murphy v. Carlin*, a Missouri court found a trust based on a "wish and desire" addressed to a wife, noting that "it is not expected that commands [to a wife] would be expressed in such forcible language as between strangers."[104] However, many other courts have found that no trust was created even when language was addressed to a close relative.[105] An Iowa court nicely summarized the view of these courts: "Generally speaking, a wish is a wish, and nothing more, unless the testator used it in such a way as to indicate a different intention."[106]

Other courts may look to the personal attributes of the speaker rather than the listener and take into account the personal background of the testator—or

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97. Courts may also find reasons to avoid determining whether the precatory language was intended to be binding, such as when the property to which the language referred was uncertain. *See, e.g.*, Magnant v. Peacock, 25 So.2d 566, 567 (Fla. 1946).

98. *See* Schiavo, *supra* note 13, at 661.

99. *In re* Hood's Estate, 135 P.2d 383, 385 (Cal. Dist. Ct. App. 1943) (citing *In re* Lawrence's Estate, 108 P.2d 893 (Cal. 1941) and *In re* Mallon's Estate, 93 P.2d 245 (Cal. Dist. Ct. App. 1939)). Directions addressed to trustees are regarded similarly to those addressed to executors. *Id.*

100. *See* Donelson's Ex'r v. Coates, 186 S.W.2d 420, 422 (Ky. Ct. App. 1945).

101. *In re* Estate of McReynolds, 800 S.W.2d 798, 800 (Mo. Ct. App. 1990).

102. Pittman v. Thomas, 299 S.E.2d 207, 212-13 (N.C. 1983).

103. Knisely v. Simpson, 74 N.E.2d 695, 699 (Ill. 1947) ("Precatory expressions are more frequently deemed to be intended to be mandatory if the person to whom they are addressed is the spouse of the testator, as here, to whom it is not to be expected that commands would be expressed in the same forcible language as between strangers.") (citation omitted).

104. 20 S.W. 786, 787 (Mo. 1892) (citation omitted).

105. *See In re* Hellman's Estate, 266 N.W. 36, 40 (Iowa 1936); Goslee's Adm'r v. Goslee's Ex'r, 94 S.W. 638, 639 (Ky. 1906); Morris v. Morris, 327 N.E.2d 917, 918 (Mass. App. Ct. 1975); Page v. Buchfinck, 275 N.W.2d 826, 832 (Neb. 1979).

106. *In re* Campbell, 229 N.W. 247, 248 (Iowa 1930). The court also listed cases in which "wish" was held to create a trust and cases in which it was held not to create a trust. *Id.* As of 1930, the vote was split, with the "nays" ahead of the "yeas"; *In re Campbell* cited sixteen cases in which "wish" was held to create a trust and twenty where it was not. *Id.*

the will drafter[107]—in determining whether a man or woman intended precatory words to create a trust.[108] In the case *In re Daintrey's Estate*, a New York court held that where a woman who was unfamiliar with the law used milder terms in her will, it should be found to include intent to create a trust.[109] Using the same logic, an Indiana court found that when a will drawn by a skilled lawyer used words of "wish"—given that the will used technical language to create other trusts—indicated that the precatory words were not meant to create a trust.[110]

At least one state appears to persist in using the old English rule that precatory language creates a trust: New Jersey.[111] In 1914, the New Jersey Court of Chancery held that when a mother granted property to her daughter, but with a "wish," "desire," and "request" that the daughter use only the income and devise the corpus at her death to certain beneficiaries, these words created a trust in favor of the specified beneficiaries.[112] Justice Leaming explained the English rule of construction:

> [T]hat when, by will, property is given absolutely to a person, and the same person is by the testator "recommended," "entreated," "requested," or "wished" to dispose of that property in favor of another, the recommendation, request[,] or wish will be held to be imperative and to create a trust, if the subject and objects of the trust are certain.[113]

The court noted that the English rule of construction "was adopted by our court of last resort more than half a century ago, and has since been uniformly recognized by the courts of this state; it cannot be now questioned in this court."[114] However, now that more than another half-century has passed, the court might reconsider.

Although the effect of precatory language is largely an issue of common law in each state, Georgia created a relevant statute. The statute is consistent with the majority modern common law rule. The use of precatory language does not rule out the possibility that a trust has been created but it does subject

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107. For a discussion of how the drafting attorney's language preferences may affect the words chosen in a will or trust, see discussion *infra* Part IV.C.

108. *See* Burnes v. Burnes, 137 F. 781 (8th Cir. 1905); Ill. State Trust Co. v. Jones, 184 N.E. 623, 626-27 (Ill. 1933).

109. 211 N.Y.S. 529 (N.Y. Surr. Ct. 1925). It was unclear how much of the court's sympathy was attributable to her gender rather than her lack of legal knowledge. *See id.*

110. Lewis v. Atkins, 105 N.E.2d 183,186 (Ind. Ct. App. 1952).

111. *See* Deacon v. Cobson, 89 A. 1029 (N.J. Ch. 1924). *See also* Harkness v. Zelley, 135 A. 347 (N.J. Ch. 1926). West Virginia may follow this rule too, at least sometimes. *See* Hedrick v. Hedrick, 25 S.E.2d 872 (W. Va. 1943). *But see* Polen v. Baird, 25 S.E.2d 767, 770 (W. Va. 1943).

112. *Deacon*, 89 A. at 1029-30.

113. *Id.* at 1030; *see also Harkness*, 135 A. at 348.

114. *Deacon*, 89 A. at 1030.

the language to close scrutiny to determine donor intent. The relevant Georgia statute provides:

> (a) No formal words are necessary to create an express trust.
> (b) Words otherwise precatory in nature will create a trust only if they are sufficiently imperative to show a settlor's intention to impose enforceable duties on a trustee, and if all other elements of an express trust are present.[115]

While no other state has found precatory language, in general, to be sufficient to motivate a call to action by the legislature, several have codified the law regarding precatory language when it comes to trusts for pets. Montana, for example, as part of its Uniform Statutory Rule Against Perpetuities, includes the following provision on honorary and pet trusts:

> (1) . . .[A] trust may be performed by the trustee for 21 years but no longer, whether or not the terms of the trust contemplate a longer duration if:
> (a) a trust is for a specific lawful noncharitable purpose or for lawful noncharitable purposes to be selected by the trustee; and
> (b) there is no definite or definitely ascertainable beneficiary designated.
> (2) Subject to the provisions of subsection (3) and this subsection, a trust for the care of a designated domestic or pet animal is valid. The trust terminates when no living animal is covered by the trust. A governing instrument must be liberally construed to bring the transfer within this subsection, *to presume against the merely precatory or honorary nature of the disposition,* and to carry out the general intent of the transferor. Extrinsic evidence is admissible in determining the transferor's intent.[116]

The statute notably specifies that a court must presume against a precatory interpretation of the disposition, which would counteract any state common law presuming that a trust should not be found if precatory language were used. The application of the statute, however, is limited to trusts without definite beneficiaries and therefore not determinative in many wills.

3. The Modern Rule: Precatory Language is Hit or Miss (Heavy on the Miss)[117]

Under the modern rule on precatory language, where the court presumes that there is no trust unless the context suggests otherwise, how likely is it that

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115. GA. CODE ANN. § 53-12-21 (1997).

116. MONT. CODE ANN. § 72-2-1017 (2006) (emphasis added).

117. Is precatory language "heavy on the miss" because it is "light on the mister"? See the discussion of language and gender in Part III of this Article.

a trust will be found? The rule does not eliminate the possibility that a trust will be found, to be sure. However, at least one court has concluded that "the instances in which a trust has been held to exist have been decidedly outnumbered in the cases in which it was held that no trust was created."[118] The determination of whether a trust has been created based upon precatory words is a nuanced analysis that varies by state, and one should be reluctant to generalize too much from specific findings. That said, a review of the most recent holdings on precatory language[119] indicates that the trend away from finding a trust, transitioning since the nineteenth century, is continuing.

In the recent Washington case, *In re Estate of Curry*, the court found no trust had been created.[120] In this case, a mother left a house to her daughter, noting that "I trust her to then" give equal shares in the house to her siblings, after a debt was paid.[121] The court held that no trust was created and noted: "Precatory words are not enough to create a trust[,] and if the grantee has discretion to use the property for herself the court will not find a trust."[122]

New York also found no trust when applying modern concepts of precatory language. In *County of Suffolk v. Greater New York Councils, Boy Scouts of America*, the female testator stated, "It is my wish that the proceeds of this gift to it shall be used for the improvement of Boy Scout Camps, or for the establishment of a new camp . . . ."[123] The court noted that the bequest was "essentially precatory in nature" and held that the statement made no impact upon the discretion of the Boy Scouts to manage the property.[124]

Illinois has followed suit, finding that no trust was created when precatory language was used. In *Mykola v. Skeltinska*, the male testator left a will granting property to a cousin, providing: "It is my wish and desire that my said cousin, Anna Sklepinska, mails parcels containing food, clothing, jewellery etc. to the following persons . . . ."[125] The court noted,

> The test used by the court in determining whether testamentary words are mandatory or merely precatory is whether the testator, in using those words, meant to control the disposition of the property . . . [I]f the testator is merely expressing an opinion as to the disposition of the property, leaving it to the discretion of the first taker to dispose

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118. *In re* Lee's Estate, 284 P. 948, 949 (Cal. Ct. App. 1930). In 1930, an Iowa court listed cases in which "wish" was held to create a trust and cases in which it was held not to create a trust; the vote was split, with the "nays" ahead of the "yeas." *In re* Campbell, 229 N.W. 247 (Iowa 1930) cited 14 cases in which "wish" was held to create a trust and twenty where it was not. *Id.* at 248.

119. Cases cited in this section are from 1980 or later.

120. 988 P.2d 505 (Wash. Ct. App. 1999).

121. *Id.* at 506.

122. *Id.* at 508.

123. 413 N.E.2d 363, 364 (N.Y. 1980).

124. *Id.* at 364.

125. 417 N.E.2d 699, 701 (Ill. App. Ct. 1981).

> of the property as he sees fit, then the words do not express the will of the testator and are merely precatory.[126]

The court found that the "wish and desire" was not binding and did not create a trust.[127]

Can the modern rule on whether precatory language creates a trust even be called a "rule," given its relative uselessness in assessing whether a trust will be found in a specific situation? From time to time, courts have expressed some frustration with the lack of determinacy of the rule on precatory trusts. One appellate judge noted that the construction given earlier documents was not valuable as precedent in construing any given will.[128]

> And this is particularly true of cases involving the existence or nonexistence of a precatory trust, for previous decisions only serve to illustrate the application of general rules of construction of wills, which, after all, is a matter of impression as to the maker's intention made upon the mind of a court considering the will itself with the circumstances surrounding its execution.[129]

The court concluded that cases construing the meaning of precatory words in wills necessarily required a fact-based analysis, specific to the instrument before the court.[130]

So what do we make of modern law on precatory language? Is there any hard and fast rule for determining whether the language used by a man or woman will create a legally binding trust? It may be that the only thing certain about precatory language at this point is its uncertainty. Professor Frank Schiavo investigated the impact of precatory language in his recent article, *Does the Use of "Request," "Wish," or "Desire" Create a Precatory Trust or Not?*[131] Schiavo pointed out that given that "the settlor's intent is the hallmark

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126. *Id.* at 702.

127. *Id.*

128. In re Sowash's Estate, 217 P. 123, 126 (Cal. Ct. App. 1923).

129. *Id.* at 126-27.

130. *Id.*

131. Schiavo, *supra* note 13. This thoroughly researched and well-articulated article is helpful to anyone with an interest in precatory language and was a particularly useful reference for this Article. Aside from the outstanding article written by Professor Schiavo, very little scholarship has centered upon the role of precatory language in wills as its main focus. However, several articles are relevant and help inform our discussion, including: Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988) (discussing the role of the state in determining the owner's subjective intent); Francis F. Foster *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001) (discussing the cultural bias inherent in restrictions that base inheritance on blood ties); Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057 (1996); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) (discussing prevailing mandatory rules in American trust law); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (discussing possible reforms to the law of wills in order to follow

of a trust," it would not be appropriate for courts to always give precatory words their "plain meaning" and fail to find a trust where they are used.[132] But does this mean that users of precatory language are doomed to uncertainty? The closing quote chosen by Schiavo is not promising: "'I doubt if there can exist any formula for bringing to a direct test the question whether words of request or hope or recommendation are or are not to be construed as obligatory.'"[133]

Although using precatory language renders the outcome unpredictable, in some cases there may be a place for it in a well-drafted estate plan. Precatory language may be appropriate where the client does not intend to create a trust, but instead wants to maintain flexibility in the hands of the trusted recipient of property.[134] Careful use of precatory language may also prove useful in the tax planning context. In order to qualify for the charitable deduction from federal estate tax, property must "pass" from the decedent to the charity.[135] Assets that pass to charity as a result of a testamentary "request" instead of a testamentary "direction" do not pass from the decedent.[136] In some cases, creating a disposition that is not a legally enforceable direction may be superior tax planning; it can allow a beneficiary the benefit of a charitable income tax deduction when the beneficiary chooses to comply with the request.[137]

Precatory language may have its place, but its role and construction is frequently misunderstood. Perhaps the best summary of the current status of the law on precatory words is they are often construed as an indication that the user of the language did not intend to create a legally binding trust. But what

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testamentary intent); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595 (2005); Scott T. Jarboe, Note, *Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistic Approach*, 80 WASH. U. L.Q. 1365 (2002).

132. Schiavo, *supra* note 13, at 666.

133. *Id.* (quoting Vice-Chancellor Cranworth in Williams v. Williams, [1851] 61 Eng. Rep. 139, 143 (Ch.).

134. *See, e.g.*, TEX. FAM. L. SERV. § 48:53 (2006).

> Sometimes a client wants to leave personal effects to one trusted person, for distribution among friends or relatives. This can be accomplished with precatory language that leaves all decisions entirely to the beneficiary's discretion. This involves the risk of a possible challenge from potential beneficiaries who claim that it is mandatory language, and the possibility that the beneficiary will not know precisely what the testator would approve. The client can avoid both of these, with maximum flexibility, by leaving things absolutely to the beneficiary, with separate instructions to distribute according to another writing, such as a letter. This way the letter is not a testamentary instrument, need not comply with will requirements, and can be changed as often as the client wishes. The risk, of course, is that the beneficiary can with impunity chose to ignore the letter of instruction.

Id.

135. *See* I.R.C. § 2055 (2006).

136. 13 FLA. PRAC., ESTATE PLANNING § 30:21 (2007).

137. *Id.*

leads men and women to choose the language that they do is a complicated question.

III. LANGUAGE AND GENDER: THE SOCIAL PSYCHOLOGY OF WORD CHOICE

Men and women are different, and they use language differently. To say that men and women are different, however, is not to assert that one sex is superior to the other or even that the differences outweigh the similarities.[138] In truth, there are likely far more similarities than differences between men and women with respect to their language use as well as in other arenas.[139] The differences, though, are interesting to explore.[140]

As psychological researcher Anthony Mulac puts it, there are "two abiding truths" about gender and language: "(a) Men and women speak the same language and (b) men and women speak that language differently."[141] Psychologists differ in their opinions as to how vast the difference is between the sexes and the reasons the differences may appear.

Although some of the psychological research discussed in this Article focus on spoken language rather than written language, studies of both sorts demonstrate the different approaches men and women have to word choice. Some linguists argue that spoken language and written language are distinguishable on several grounds.[142] However, a number of studies have shown no important linguistic differences between written and spoken language. Linguist Douglas Biber's work suggests that there is "no single, absolute difference between speech and writing in English; rather there are several dimensions of variation and particular types of speech and writing are

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138. The differences between men and women may be small or even insubstantial, but there may be societal and/or biological explanations for the small differences that we do see. Peter A. Anderson, *Researching Sex Differences within Sex Similarities: The Evolutionary Consequences of Reproductive Differences*, *in* SEX DIFFERENCES & SIMILARITIES IN COMMUNICATION 83, 83-84 (Daniel J. Canary & Kathryn Dindia eds., 1998). *See generally* GILLIGAN, *supra* note 24 (exploring the different ways men and women communicate).

139. Some researchers have suggested that gender accounts for only one percent or so of variance in communication. *See* Anderson, *supra* note 138, at 83-85. *See generally* GILLIGAN, *supra* note 24.

140. Although exploring the differences between the sexes may be interesting, there is some political pressure to avoid doing so, particularly drawing attention to unchangeable biological differences. Some experts on differences between male and female brains have been discouraged from sharing their work, out of concern that women might lose ground on pushing for "equality" if there were substantial evidence of difference. *See* Anderson, *supra* note 138. *See generally* GILLIGAN, *supra* note 24.

141. Anthony Mulac, *The Gender-Linked Language Effect: Do Languages Really Make a Difference*, *in* SEX DIFFERENCES & SIMILARITIES IN COMMUNICATION: CRITICAL ESSAYS AND EMPIRICAL INVESTIGATIONS OF SEX AND GENDER IN INTERACTION 127, 127 (Daniel Canary & Kathryn Dindia, eds., 1998).

142. DOUGLAS BIBER, VARIATION ACROSS SPEECH AND WRITING 5 (1988) ("The general view is that written language is structurally elaborated, complex, formal, and abstract, while spoken language is concrete, context-dependent, and structurally simple.").

more or less similar with respect to each dimension."[143] Even if speech and written language do differ to some degree, studies that focus on gender difference in spoken language can at least inform our discussion and understanding of gender differences in written language.

Psychologists who studied differences in language use between men and women have proposed various hypotheses as to why these differences may emerge. In the following Section, we will examine the psychological connection between masculinity, femininity, and the words people choose to express themselves.

A. *Verbal Differences in Gender: Early Childhood*

Differences in the ways that males and females use language appear very early in life—perhaps nearly as soon as we begin to speak. Research suggests that among boys and girls as young as fourteen to twenty months of age, girls have a stronger capacity to learn emotional or expressive language.[144] Other studies have shown that girls between the ages of one and five years are more proficient in language skills than boys.[145] Although some researchers believe the advantage develops later in childhood (some argue that significant differences do not appear until around age eleven),[146] many psychologists have identified a distinction between boys and girls when it comes to language.

Why is there a difference in language use and ability between boys and girls? Are there natural biological differences between males and females or merely differences in socialization and opportunities for learning? If the answer is both, how important are these factors relative to each other?

Harvard psychology professor Leslie Brody suggests that the varying capabilities of infant and toddler boys and girls to learn language results primarily from socialization: from the encouragement that mothers and fathers give to their children as their language skills are developing.[147] Research shows that not only do parents often spend more time communicating to infant

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143. *Id.* at 199.

144. *See* LESLIE BRODY, GENDER, EMOTION, AND THE FAMILY 131 (1999). Infant girls may also be more empathic than infant boys (given the measure of reflexive crying). Peter A. Anderson, *The Evolution of Biological Sex Differences in Communication, in* SEX DIFFERENCES AND SIMILARITIES IN COMMUNICATION 117, 119 (Kathryn Dindia & Daniel Canary eds., 2d ed. 2006).

145. *See* ANN WEATHERALL, GENDER, LANGUAGE AND DISCOURSE 44 (2002). Weatherall notes that researchers have suggested that of all of the gender differences, disparity in language use and ability may be the first to appear. *Id.*

146. Weatherall points out that some researchers suggest that there are very little sex differences in verbal skill between the ages of three and eleven years, but a "new phase of differentiation occurs at adolescence." After the age of ten or eleven years, there is more compelling evidence of a female advantage in verbal ability, which persists through the high school and college years. *See id.*

147. *See* BRODY, *supra* note 144, at 131.

daughters than to infant sons, but a daughter's speech is also more likely to be encouraged while a son's is more likely to receive negative reactions.[148]

Parents alter the amount of emotional language (talking about feelings) that they use depending upon the sex of their child.[149] Both mothers and fathers use more emotional language and speak in more narrative detail when they are communicating with their daughters than with their sons.[150] Parents may tend to speak more emotionally with girls than boys because the parents are influenced by the stereotype that girls are more "language oriented" than boys are.[151] Brody speculates that this may explain why the children on the listening end of these conversations develop different language skills: that girls develop to use more emotional language in their speech than boys, leading to a "greater verbal expression of feelings by women than by men."[152]

If mothers and fathers socialize their sons differently from their daughters when it comes to language use, why might they do so? Brody suggests that parents may socialize their children differently in order to protect their children from their vulnerabilities and to maximize their strengths.[153] For example, parents may consider a daughter's strength to be her sociability and verbal skills (while her activity levels or athleticism may be comparably weak), while they may consider a son's strength to be his high activity levels (while his immature behavior, poor self-control, and emotional instability may be considered weaknesses).[154] Because of the way parents perceive their daughters' strengths and weaknesses; they teach their daughters to express themselves, to rely upon their language skills and sociability, and to use words rather than physical aggression.[155] On the other hand, parents teach their sons to develop their physical strength and abilities and to rely upon their success in physical activity.[156] Parents attempt to instill the masculine ideals of strength, independence, and invulnerability upon their sons—often not through language, but through physical activities and athletics.[157] Overall, the stereotypes of women and men may influence the way they raise their children and the characteristics that these children display when they develop into grown women and men.[158]

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148. *Id.*

149. *Id.*

150. *Id.* at 130-32.

151. *Id.* at 132.

152. *Id.*

153. *See id.* at 140-41.

154. *Id.* at 141.

155. *Id.*

156. *See id.* Girls also tend to be less aggressive than boys (based on such measures as self-report scales and direct observation). *See* JUDITH A. HALL, NONVERBAL SEX DIFFERENCES: COMMUNICATION ACCURACY AND EXPRESSIVE STYLE (1984).

157. BRODY, *supra* note 144, at 141.

158. *Id.* at 142.

Gender differences in language use may develop throughout childhood, and several researchers have studied how boys and girls use language differently. Researchers Campbell Leaper and Tara Smith investigated three main criteria on which boys and girls appear to differ: talkativeness, affiliative speech, and assertive speech.[159] The study concluded that girls tend to be more talkative than boys and more likely to use affiliative speech, whereas boys are more likely to use assertive speech.[160] Between the ages of one and three years, the girls were markedly more talkative than the boys—perhaps due to their apparent early advantage in language development skills or perhaps due to their socialization.[161] The differences in affiliative and assertive speech were also notable, although the type of activity in which the children were engaged also affected whether children of either sex used affiliative or assertive speech.[162]

Psychologists have several theories as to why children exhibit differences in their speech including biological, social constructionist, and developmental approaches.[163] Under a biological theory, differences in language choice between girls and boys can be explained by reference to disparities in the way male and female brains function and are organized.[164] Under a social constructionist approach, the differences are explained with reference to the immediate context of the conversation and the situational demands of that context, as well as the indirect influences of the larger socio-cultural context in which children find themselves.[165] Finally, the social-developmental model focuses on how cognitive learning and experience throughout the childhood years influence an individual's development.[166] Each of the three models can claim some support from experimental research, and each has its own committed following.

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159. Campbell Leaper & Tara E. Smith, *A Meta-Analytic Review of Gender Variations in Children's Language Use: Talkativeness, Affiliative Speech, and Assertive Speech*, 40 DEV. PSYCHOL. 993, 993 (2004). "Talkativeness" is frequency of language use and can be measured in number of words used in a conversation, percentage of speaking time, or other factors. *Id.* at 998. "Affiliative speech" is positively responsive language—words that support or encourage the partner or partners in the conversation. *Id.* "Assertive speech" is self-emphasizing verbal acts—words that direct attention toward one's self or one's wants and needs. *Id.*

160. *Id.* at 1018.

161. Girls may be socialized (by their parents as well as other adults and children) to engage in conversations, whereas boys may receive less emphasis on developing this trait. *Id.* at 1019.

162. Girls used greater affiliative speech than boys during unstructured situations, but when boys and girls were engaged in the same activity, there did not appear to be a strong difference between boys and girls in the amount of affiliative speech they used. It is possible that certain types of activities (like sports or playing house) have a type of language that is generally adopted for the activity. *Id.* at 994-95.

163. *See id.*

164. *Id.*

165. *Id.* at 994.

166. *Id.* at 995.

B. *Verbal Differences in Gender: Adulthood*

Differences in the way that males and females talk are not relegated to the young. Many studies have shown disparity between adult men and women in the way they use language. Although many of the studies focus on spoken language, the findings are relevant to the written word as well.

Susan Gal, an anthropologist linguist, pointed out that "'male-female differences in speech have been found in every society studied; but the nature of the contrasts is staggeringly diverse, occurring in varying parts of the linguistic system: phonology, pragmatics, syntax, morphology, and lexicon."[167] The differences vary from culture to culture, and some cultures even demonstrate trends that are the direct opposite of the majority of findings in American society.[168] For the purposes of this Article, only studies with English-speaking subjects are considered.

Several authors have attempted to identify some of the major variables on which men and women differ when it comes to language choice.[169] For example, Cheris Kramer, Barrie Thorne, and Nancy Henley suggested that phonological variants, pitch, volume, fluency, empty adjectives, and tag questions may be some of the main areas of difference.[170] Researcher Judith Hall hypothesized that women are more "verbally skilled," make more "socioemotional contributions" in small groups, and are more empathetic as

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167. *See* WEATHERALL, *supra* note 145, at 54 (citing Susan Gal, *Between Speech and Silence: The Problematics of Research on Language and Gender, in* GENDER AT THE CROSSROADS OF KNOWLEDGE: FEMINIST ANTHROPOLOGY IN THE POSTMODERN ERA 175, 181-82 (Micaela di Leonardo, ed., University of California Press, 1991).

168. For example, one researcher found that Malagasy men characteristically use indirect, ornate, more polite speech, while women use a more direct and straightforward style. *See id.* (citing Elinor Keenan, *Norm-makers and Norm-breakers: Uses of Speech by Men and Women in a Malagasy Community, in* EXPLORATIONS IN THE ETHNOGRAPHY OF SPEAKING 125, 137 (Richard Bauman & Joel Sherzer, eds., 1974)).

169. For additional background on the psychological connection between gender and language in general, see Janet Holmes, *Politeness and Postmodernism—An Appropriate Approach to the Analysis of Language and Gender?* 9 J. OF SOCIOLINGUISTICS 108 (Feb. 2005); Anthony Mulac et al., *Male/Female Language Differences and Effects in Same-Sex and Mixed-Sex Dyads: The Gender-Linked Language Effect,* 55 COMM. MONOGRAPHS 315 (Dec. 1988); Anthony Mulac et al., *Male/Female Language Differences and Attributional Consequences in a Public Speaking Situation: Toward an Explanation of the Gender-Linked Language Effect,* 53 COMM. MONOGRAPHS 115 (June 1986); Elizabeth H. Stokoe, *Analysing Gender and Language,* 9 J. OF SOCIOLINGUISTICS 118 (Feb. 2005).

170. Cheris Kramer et al., *Perspectives on Language and Communication Signs,* 3 J. OF WOMEN IN CULTURE AND SOC'Y. 638, 638-51 (1978). "Phonological variants" refers to correct grammar and diction: women more often choose the form closer to the "correct" way of talking than men. *Id.* at 639. With respect to pitch, woman use a wider array of pitches and more variable intonation than male speakers. *Id.* With respect to volume and fluency, men have been found to speak louder and with less fluency and with more filled and unfilled pauses than women. *Id.* Finally, women are more likely to use empty adjectives (such as "like" or "so") and tag questions (questions following statements, such as "don't you think?"). *Id.* at 640.

adults.[171] Men, on the other hand, appear to have superior skills quantitatively, visiospatially, and in their ability to detach themselves cognitively from their surroundings, according to Hall.[172]

One study has identified several specific criteria upon which men and women differ in their speech.[173] In the study, pairs of subjects were asked to solve a problem together, and their speech was recorded.[174] In the course of the task, men were more likely to interrupt their partner and more likely to use directives (telling their partner what to do, such as "write that down.").[175] Women, on the other hand, were more likely to employ questions and to use intensive adverbs (like "really" or "very").[176] In other words, men were more likely to direct, while women were more likely to ask.[177]

Researcher Anthony Mulac, after a meta-analysis of thirty psychology studies, has identified specific linguistic features that distinguish male from female language on a fairly consistent basis.[178] In two or more investigations, several linguistic features were found to distinguish male from female language. Men were more likely to (1) make references to quantity ("[thirty] feet tall"); (2) use judgmental adjectives ("good" or "bad"); (3) use elliptical sentences (short and choppy, like "great picture"); (4) use directives ("do this"); (5) use locatives ("right there"); and (6) make reference to themselves ("me" or "I").[179] Women were more likely to (1) use intense adverbs ("so" or "really"); (2) refer to emotion ("I feel"); (3) use dependant clauses; (4) use longer sentences, (5) use sentence-initial adverbials ("when the material is too difficult, studying with someone can be very beneficial"), (6) use uncertainty verbs ("it seems to be"), (7) use opposition ("the tone of it is very peaceful, yet full of movement"), (8) use negations ("not"), (9) use hedges ("maybe"), and (10) ask questions.[180] Five other factors were ambiguous, showing different results in different studies.[181]

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171. *See* HALL, *supra* note 156 at 145.

172. *Id.*

173. Mulac, *supra* note 141, at 131.

174. *Id.*

175. *Id.* ("[M]en interrupted their partner an average of 1.15 times per 100 words of their speech, whereas women interrupted .78 times per 100 words. Men used directives (e.g., 'Write that down') .31 times per 100 words, and women used directives .22 times.").

176. *Id.* (Women employed questions an average of 2.06 times per 100 words versus 1.60 times for men. Women averaged .70 intensive adverbs per 100 words, whereas men averaged .46 intensive adverbs.).

177. A statement in a will that "I direct that you use the money for your children's education" would create a legally binding trust; a statement that "I ask that you use the money for your children's education" would be subject to the rules on precatory language discussed earlier.

178. *Id.* at 133.

179. *Id.*

180. *Id.*

181. *Id.* at 134 (ambiguous factors include use of personal pronouns, tag questions, fillers, progressive verbs, and justifiers).

Mulac hypothesized that there may be gender-linked tendencies to favor certain linguistic traits over others.[182] He identified four tendencies between the sexes and connected those tendencies to the differences in language.[183] Mulac labeled these four tendencies as Direct vs. Indirect, Succinct vs. Elaborate, Personal vs. Contextual, and Instrumental vs. Affective.[184] As for Direct vs. Indirect, men were more likely to use directives, in which they gave explicit orders, whereas women were more likely to use "uncertainty verbs," in which suggestions for activities were indirect.[185] As for the dimension of Succinct vs. Elaborate, men tended to use elliptical and concise sentences, compared to women who tended to use intensive adverbs and longer, more elaborate sentences.[186] As for Personal vs. Contextual, men tended to refer to themselves in speech, whereas women did so far less frequently (making reference to the context of the discussion rather than themselves personally).[187] Finally, as for Instrumental vs. Affective, men tended to use more references to quantity (showing an instrumental focus), and women used more references to emotion (showing an affective style).[188] Mulac's research yielded the results that "men's language is characterized by being relatively direct, succinct, personal, and instrumental, whereas women's features are characterized by being relatively indirect, elaborate, contextual, and affective."[189] For example, a man would be more likely to give a brief and explicit direction ("I instruct you to give the money to Ben"), while a woman would favor a more roundabout, emotional approach ("You would make me so happy by honoring my heartfelt wishes that Ben would have the money that he really needs.").[190]

Some differences in the way men and women use language may be subtle, and only trained linguists may be able to pick up on the differences. In one study, male and female speakers were given language tasks, including the task of describing a landscape photograph.[191] Their spontaneous speech was transcribed, and a team of language coders with linguistic training analyzed the samples.[192] These linguists were able to distinguish the male from the female language using criteria such as intensifiers and references to emotion (more likely to be female) and references of quantity or big picture statements (more

182. *Id.*
183. *Id.* at 136.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.*
190. In this example, the man's words would create a legally binding trust; the woman's words would be subject to a court's application of precatory language principles.
191. Mulac, *supra* note 141, at 136.
192. *Id.* at 136-37.

likely to be male).[193] Subjects without linguistic training, however, could not accurately distinguish the male language from the female language.[194]

Several theories exist as to why women's language and communication skills or characteristics might differ from men's. One theory is evolutionary: women may have better language and communication skills because prehistoric females enjoyed a survival advantage if they had strong nurturing, empathizing, and social networking skills.[195] Men, on the other hand, would have a survival advantage if they developed spatial skills that would contribute to their hunting ability and fostered a lack of empathy that would support the men in being aggressive as they competed for resources.[196]

Other researchers have noted the possible connection between the language of men and women and their relative social status.[197] Linda Carli suggested women may be softening their speech with tentative language, hedges, and tag lines because men are more dominant, are more assertive, and are regarded at a higher status than women.[198] However, Carli also put forth a compelling counterargument: while women's tentative speech may be a way for women to try to deal with status inequalities between the sexes, perhaps it could also be a result of women being more emotional and socially competent.[199] "In fact, two of the gender differences, the use of intensifiers and verbal reinforcers, appear to be less a reaction of women's greater tentativeness than of their greater emotional expressiveness and sociability . . . ." noted Carli.[200] Furthermore, Carli suggested that the use of tentative language may be effective: women appear to be more influential upon men when they use tentative language (rather than aggressive words); by softening their diction, women are more likely to get what they want.[201]

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193. *Id.* at 138-39.

194. *Id. See also* Anthony Mulac & Torborg Luisa Lundell, *Differences in Perceptions Created by Syntactic-Semantic Productions of Male and Female Speakers*, 47 COMM. MONOGRAPHS 111, 114 (1980).

195. *See* Deborah Cameron, *Language, Gender, and Sexuality: Current Issues and New Directions*, 26 APPLIED LINGUISTICS 482, 500 (2005).

196. *Id.*

197. Linda L. Carli, *Gender, Language, and Influence*, 59 J. PERSONALITY & SOC. PSYCHOL., 941 (1990); Julia T. Wood & Kathryn Dindia, *What's the Difference?: A Dialogue about Differences and Similarities between Women and Men*, *in* SEX DIFFERENCES & SIMILARITIES IN COMMUNICATION 19, 29 (Daniel J. Canary & Kathryn Dindia, eds., 1998). Keep in mind, however, that not all cultures have masculine language as the dominant style of communication. *Id.* Julia T. Wood and Kathryn Dindia's research suggests that "masculine communication cultures accentuate instrumental goals, linear organization, individualistic orientations, and monologic, competitive forms of speech. . . . [whereas] [f]eminine communication cultures generally accord greater priority to expressive goals, fluid organization, collective or communal orientations, and interactive, cooperative forms of speech." *Id.* (citations omitted).

198. Carli, *supra* note 197.

199. *Id.* at 942-43.

200. *Id.* at 942 (citations omitted).

201. *Id.* at 944.

Researchers Julia Wood and Kathryn Dindia agree that social power and status are related to differences in the way men and women communicate.[202] Wood asserted that "those who hold subordinate social roles learn to interpret subtle nonverbal behaviors, to defer, please, notice, and attend to others' needs, to speak tentatively and indirectly, and to be non-threatening and to make others comfortable."[203] According to Wood, because women have social power that is inferior to men's, women develop these traits in their language.[204]

Psychologist Ann Weatherall has discussed two approaches to understanding women's language: a dominance approach and a difference/ cultural approach.[205] Under the dominance approach, women's weaker word choice can be explained as a result of their subservient position in society.[206] This approach "stresses the hierarchical nature of gender relations."[207] Under the difference/cultural approach, women's language is not so much a reflection of powerlessness as an expression of certain social values; women value connection and affiliation, whereas men value status, and their disparate values are reflected in their speech patterns.[208] Men learn "to assert a position of dominance, to attract and maintain an audience, and where they must assert themselves by interrupting when another person has the floor."[209] Their style of communication is therefore predominantly competitive, whereas women's style is predominantly cooperative.[210]

Most published studies show differences between men and women in their language use;[211] some studies suggest that there may be differences between men and women on various aspects of cognitive ability.[212] Research has shown

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202. Wood & Dindia, supra note 197 at 21.

203. *Id.*

204. *Id.*

205. *See* WEATHERALL, *supra* note 145, at 69-71.

206. *Id.* at 69.

207. *Id.*

> "Hierarchies determine whose version of the communication situation will prevail; whose speech style will be seen as normal; who will be required to learn the communication style and interpret the meaning of the other; whose language style will be seen as deviant, irrational, and inferior; and who will be required to imitate the other's style in order to fit into the society. Yet the situation of sex difference is not totally parallel; sex status intercuts and sometimes contrasts with other statuses; and no other two social groups are so closely interwoven as men and women."

Id. (quoting Nancy Henley & Cherise Kramarae, *Gender, Power and Miscommunication, in* "MISCOMMUNICATION" AND PROBLEMATIC TALK 18, 19-20 (Nikolas Coupland et al., eds. 1991).

208. *See id.* at 55-56.

209. *Id.* at 71.

210. *Id.*

211. One of the shortfalls of published psychological research, however, is that experiments showing no difference are less likely to be published.

212. *See, e.g.*, Anderson, *supra* note 138; Diane F. Halpern, *Public Policy Implications of Sex Differences in Cognitive Abilities*, 2 PSYCHOL. PUB. POL'Y & L. 561, 563 (1996).

that women tend to outperform men on some language-related tasks (such as those related to speech articulation, word sounds, and meaning) as well as on fine motor tasks.[213] Studies have indicated that "women are better decoders and encoders of nonverbal and emotional communication . . . , are more skillful and connected listeners . . . , and are more engaged empathic communicators" than men.[214] Women are also genetically predisposed to greater sensitivity.[215]

Men, however, tend to outperform women on several types of cognitive tasks. Men excel in tasks related to reasoning with mathematical and spatial information, making judgments about moving objects, and aiming and throwing projectiles.[216] The male advantage of spatial skills[217] is one of the best-supported and reliable cognitive differences.[218] Men also succeed at field independence ("the ability to separate a stimulus from its environmental setting in a surrounding visual field") and in tests in which the subject must readjust the position of an object to its vertical position.[219] Men also outperform women on certain measures of spatial memory, tracking tests, and motor skills.[220]

Why women and men exhibit these differences in performance—and whether they are related to innate ability—is unclear, although theories abound. Some researchers credit prenatal biology.[221] In a developing fetus, biological differences such as the presence of ovaries or testes can affect the type or amount of prenatal hormones that are released during critical periods of fetal development, which in turn affects the development of the brain and other organs.[222] Research has shown that testosterone and estrogen play critical roles in sex-typical cognitive abilities, such as language skills and spatial reasoning.[223] In addition to their role in prenatal development, hormones may

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213. Halpern, *supra* note 212, at 563.

214. Anderson, *supra* note 138, at 86 (citations omitted). "In the area of social sensitivity, and of nonverbal sensitivity in particular, women earn their deserved reputation for enhanced social skill and intuition." *Id.* (citation omitted).

215. *See id.* at 88. There are several competing explanations for difference in sensitivity: (1) sex differences in brain lateralization; (2) chromosomal differences (sensitivity may have greater benefits for women because women have significantly greater parental investment); or (3) presence of hormones at critical stages of development. *Id.* at 89.

216. Halpern, *supra* note 212 at 563.

217. Interestingly, men and women employ different mental strategies in attempting to perform spatial tasks. Men often attempt to visualize the entire pattern, whereas women seem more likely to use verbal labels. Anderson, *supra* note 138, at 91.

218. *See id.* at 90-91. Perhaps the advantage stems from evolution, with men having greater need of navigational skill to locate mates or to detect movement of enemies or predators. *Id.*

219. *Id.* at 91.

220. *Id.*

221. Halpern, *supra* note 212 at 563, 565. Halpern also acknowledges that experience and social environments influence cognitive abilities. *Id.* at 565.

222. *Id.* at 563, 565.

223. *Id.* at 565.

continue to play a role in cognitive functions throughout a person's lifetime.[224] Throughout the adult years and into old age, steroidal hormones have been shown to influence how well people perform on tests of cognitive abilities.[225]

After noting that differences between men and women in their use of language have been observed, several commentators have voiced opinions on whether that difference is helpful or hurtful. Some believe that using different language or speech characteristics creates a negative stigma for women, one associated with less power and status, and that perhaps women ought to adopt the forms of language associated with power (and generally males).[226] Others have argued that the path to equality is to support and promote female forms of language and to encourage their broader adoption.[227] Some authors have suggested that changing language use and structure—and even adopting gender-neutral pronouns—would promote social equality.[228] Many commentators agree that in the current state of affairs, prejudices against female speech and female speakers (including public speakers and language innovators) threaten progress toward fuller acceptance of "female" language choice.[229]

Others have criticized academia and the media for their perhaps unbalanced focus on gender and sex differences. For example, Kathryn Dindia pointed out that although gender differences may be interesting to study, they may account for only a tiny portion of the differences between individuals.[230] Furthermore, publications are not always clear that most differences are a matter of degree rather than kind: for example, research may show that women are more talkative than men, but this is not to say that women are talkative and men are not. Quantitative research techniques could be improved and the studies could be more robust, if there was less promotion (by the media and others) perpetuating the idea of men and women as two separate dichotomies.[231]

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224. Women's cognitive abilities fluctuate in reciprocal fashion across the menstrual cycle in response to hormonal changes. *Id.* at 565. The author's personal suspicions are that hormonal fluctuations throughout pregnancy may affect cognitive reasoning, and the author feels justified in attributing any errors or omissions in this article, as well as any moments of insight, to her daughter Lila, born February 6, 2007.

225. *Id.* at 565-66.

226. Kramer et al., *supra* note 170, at 642, 648. Kramer et al. note that some have promoted this argument (but not necessarily endorsed it). *See generally* GILLIGAN, *supra* note 24.

227. *See* Kramer et at., *supra* note 170.

228. *See id.*

229. *Id.*

230. *See* Wood & Dindia, *supra* note 197, at 23.

231. *Id.* at 26-27.

C. *Sex or Gender?*

Is the difference in language use a matter of sex—maleness or femaleness—or a matter of gender—the social constructs of masculinity or femininity?[232] Sex and gender are not identical descriptors, but there is often a good deal of overlap.[233] Although there is a healthy debate as to whether nature or nurture is determinative, many researchers acknowledge the difficulty of making sound judgments in this area. Psychology expert Judith Hall explained, "[m]aleness and femaleness are mixtures of biology, tastes, attitudes, personality traits and social behavior," making it extremely difficult to ascertain which factor or factors are responsible for a given sex difference.[234]

While acknowledging the biological differences between men and women, many psychologists credit gender rather than sex for distinctions in behavior. For example, psychologist Julia Wood noted that there are twenty-three pairs of chromosomes that serve as "the blueprint for human nature" and that only one pair governs sex.[235] She argued that actual sex differences are limited to primary and secondary sex characteristics and the resulting physical characteristics and capabilities.[236] Instead, gender accounts for the vast majority of the differences between men and women, and gender is constructed by social ideologies.[237]

In early psychological research (in the 1970's), linguistic gender differences were thought to be the result of "patriarchal socialization which produced the two groups as different and unequal."[238] Modern gender studies are more inclined to examine the nuances of gender. As psychologist Deborah Tannen has noted, "Masculinities and femininities come in multiple varieties,

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232. Sex is what is born and gender is what is made. *See* Cameron, *supra* note 195, at 485.

233. There are several theories as to how the connection between sex and gender should be portrayed. *See id.*, at 484-85. Under the Modern Feminist Approach, gender is built on the foundation of sex: people start out biologically male or female, and then socialization as a member of one sex group or the other leads to gender identity. *Id.* Under the Postmodern Feminist Approach, the foundational status of sex is disputed, sex itself is not "natural" but is only a construct, and so-called "biological facts" are always filtered through social preconceptions about gender. *Id.* Under the Dominance Approach to Language and Gender, women's language is primarily a matter of feminine gender and not biological sex; the language is a display of the subordinate status women have in patriarchal societies. *Id.* Deborah Tannen argues for a Cultural Differences theory, in which "linguistic gender differences were produced not by the subordination of women, but by the social arrangements which separate boys from girls in the formative period of childhood and adolescence." *Id.* at 485. Others have criticized this view on the grounds that children are not truly segregated into separate sex groups during these formative years.

234. *See* HALL, *supra* note 156, at 4.

235. Wood & Dindia, *supra* note 197, at 30.

236. *Id.*

237. *Id.*

238. *See* Cameron, *supra* note 195, at 485.

inflecting and inflected by all the other dimensions of someone's social identity—their age, ethnicity, class, occupation, and so forth."[239]

Modern social science research continues to explore gender differences in language and the psychological and social reasons for these differences. As the years pass and more attention and funding is given to experimental research in this area, our understanding of masculine and feminine speech will expand. Meanwhile, those seeking an explanation for why men and women use language differently are also exploring biological justifications for these differences.

D. *The Biology of the Brain: Physiological Explanations for Sex Difference in Language*

Male and female bodies are notably different, and a man's brain and a woman's brain are not identical. There are quantifiable physical differences between male and female brains—in fact, an "astonishing array of structural, chemical, and functional variations in the brains of males and females."[240] In women, the commissures of the brain (fibers that run crosswise between the right and left cerebral hemispheres that help with the exchange of information)[241] and the corpus collosum are both wider than they are in men.[242] The massa intermedia is more often missing from men than from women.[243] Parts of the frontal cortex and limbic cortex (responsible for cognitive functions and emotional responses, respectively) are bulkier in women than in men, whereas parts of the parietal cortex (involved in spatial perception) and the amygdala (involved in response to emotionally arousing information) are larger in men than in women.[244] There also appear to be differences in the posterior perislyvian areas of male and female brains.[245]

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239. *Id.* at 487 ("A further key insight is that gender identities may be constituted less by the contrast with the other gender and more by contrast with other versions of the same gender.").

240. Larry Cahill, *His Brain, Her Brain*, SCI. AM., May 2005, at 40, 41.

241. Doreen Kimura, *Understanding the Human Brain*, *in* CHILDREN'S BRITANNICA, 136, 140 (Jennifer Cox, ed., 1996).

242. Iris E.C. Sommer et al., *Do Women Really have More Bilateral Language Representation than Men? A Meta-Analysis of Functional Imaging Studies*, 127 BRAIN 1845, 1850 (2004).

243. *Id.* The massa intermedia is the part of the brain that connects the two halves of the thalamus. *Id.*

244. *Id.* at 1849-50.

245. Tracy A. Knaus et al., *Sex-Linked Differences in the Anatomy of the Perisylvian Language Cortex: A Volumetric MRI Study of Gray Matter Volumes*, 18 NEUROPSYCHOLOGY 738, 738 (2004). This study suggested that (1) men had significantly larger right Heschl's gyrus volume than women (the size of the left Heschl's gyrus was roughly equal); (2) the right Posterior Superior Temporal Gyrus was significantly larger in men than in women (with the volume of the left Posterior Superior Temporal Gyrus being roughly equal); and (3) there were significant sex differences in Planum Temporale asymmetry patterns, with

Women also appear to have more "white matter" and more "gray matter" than men and locate more of that matter in the frontal lobe (rather that the posterior lobe) of the brain.[246] "Gray matter" refers to information processing centers in the brain, and "white matter" refers to connections between these centers.[247] One study found that 84% of the gray matter and 86% of the white matter regions were found in the frontal lobe for women, as opposed to only 50% of the gray matter and none of the white matter regions for men (it was located instead in the posterior lobe).[248]

Aside from the differences in physical structure, there are apparent differences at the level of neurons. One study found that the density of neurons in certain areas of the cortex was greater in women than in men.[249] A different study found a greater density of neurons in parts of the temporal lobe cortex (associated with language processing and comprehension) in women than in men.[250] Clearly, the brains of men and women have some measurable physiological differences.[251]

Some of the differences between male and female language use may be attributable to the fact that men and women appear to use different areas of their brains for language processing. In one study, doctors performed magnetic resonance imaging (MRI) scans while men and women were performing a language processing task.[252] Whereas MRI scans for both sexes showed activation of certain areas of the left side of the brain, only scans of female brains showed activation of certain areas of the right side of the brain.[253] In addition to this disparity in bilateralization,[254] there were differences within the left hemisphere itself: the male brains showed more diffuse patterns on the MRI

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women demonstrating a leftward Planum Temporale asymmetry and men not exhibiting a consistent Planum Temporale asymmetry pattern. *Id.* at 743.

246. *Intelligence in Men and Women is a Gray and White Matter*, SCI. DAILY, Jan. 22, 2005, *available at* http://www.sciencedaily.com/releases/2005/01/050121100142.htm.

247. *Id.*

248. *Id.*

249. Sommer et al. cite a 1995 study showing that the density of neurons in layers two and four of the posterior temporal cortex was greater by 11% in women. *See* Sommer et al., *supra* note 242, at 1850.

250. Cahill, *supra* note 240, at 42.

251. Some have theorized that the differences between male and female brains are attributable largely to sex hormones present during gestation. Anderson, *supra* note 138, at 89. *See also* Kimura, *supra* note 241, at 141 (noting that when female rats were exposed to androgens right after birth, they developed spatial abilities comparable to male rats and that human females exposed to excessive androgens have better spatial skills than average females).

252. L.C. Baxter, et. al., *Sex Differences in Semantic Language Processing: A Functional MRI Study*, 84 BRAIN & LANGUAGE 264 (2003).

253. *Id.* at 267-68. Some researchers have theorized that the male advantage in visiospatial skills may be attributable to the fact that they do *not* use their right brains in language; perhaps women suffer losses in visiospatial abilities because their right brains are used for language instead. *See* Sommer et al., *supra* note 242, at 1845-46.

254. With only women being in their right minds, so to speak.

than the female brains.[255] This study suggests that there are differences both between the hemispheres (which side of the brain the sexes use) and within the hemisphere (which parts of the chosen hemisphere the sexes use) when it comes to language processing.[256] This difference in brain processing may explain why men and women use language differently.

Support for the theory that men and women use different parts of their brains for language processing comes from several studies of stroke victims.[257] Among individuals who suffered a stroke affecting the left side of their brains, men were more likely to suffer aphasia than women; women instead suffered comparable language deficits only after damage to both sides of the brain.[258]

While acknowledging the physical differences between the male and female brains, it is important not to overstate them or to suggest that there are few similarities. Likewise, any suggestion that one sex has inferior intelligence (as opposed to merely differences in skill) is neither intended by this Article nor supported by its research.[259]

E. *Conclusion*

There are abundant quantifiable differences in the way the sexes use language. Both biological and social forces contribute to these differences. Before we are born, different hormones stimulate disparity in brain growth and function, and throughout adulthood, physiological differences in the brain endure.[260] Throughout childhood, boys and girls enjoy different social experiences, including varying relationships with parents, caregivers, and peers.[261] In adulthood, men and women manifest different styles of communicating that have inspired countless hours of psychological research

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255. The researchers noted, "Both groups displayed activation in the left inferior frontal gyrus (IFG), left superior temporal gyrus (STG), and cingulated. Females, but not males, showed bilateral IFG and STG activation . . . females had less diffuse left activation and greater right posterior temporal and insula region activation than males." Baxter et al., *supra* note 252, at 264.

256. Not all MRI studies have shown conclusive differences in bilateralization. *See* Sommer et al., *supra* note 242.

257. *See* Baxter et al., *supra* note 252, at 264 (citing Jeannette McGlone, *Sex Differences in the Cerebral Organization of Verbal Function in Patients with Unilateral Brain Lesions*, 100 BRAIN 775, 775-93 (1977)).

258. *See id.*

259. *See* Doreen Kimura, *Sex Differences in the Brain*, 12 SCI. AM. SPECIAL ED. 1, Aug. 2002, at 32. Intelligence is the same overall for boys and girls, although the sexes may enjoy strengths in certain areas, such as spatial ability for boys and language for girls. *Id.* It is also important to keep in mind that "some of the average sex differences in cognition vary from slight to quite large and that men and women overlap enormously on many cognitive tests that show average differences." *Id.* at 34.

260. *See, e.g.*, Halpern, *supra* note 212, at 563-66; Sommer et al., *supra* note 242, at 1849-50.

261. *See* BRODY, *supra* note 144, at 130-42.

and perhaps equally countless attempts at merchandizing tools for deciphering the language of the opposite sex.[262]

The differences men and women exhibit in their language choices raise compelling questions that continue to be probed by social scientists and hard scientists. The lessons of the social psychology of word choice, however, have implications far beyond the limits of its own field.[263]

IV. LANGUAGE, GENDER, AND THE LAW: MEN, WOMEN, AND PRECATORY LANGUAGE

In Section II, this Article established that whether a person uses precatory language in his or her will is critical in determining if the directions given will be legally enforceable as a trust. Gone are the days in which soft language was accorded to be an equal with more direct and explicit instructions; modern conveyances made by a "wish" or a "hope" risk being empty suggestions unenforceable at law.

In Section III, this Article established that men and women exhibit different behaviors when it comes to language. Whether the explanation is biological, social, developmental, or otherwise, differences between men and women are evident in their language use. Even as children, boys tend to use more assertive speech, and girls tend to use more affiliative speech.[264] Women are more likely to use tentative language and hedge the statements they make.[265] Women's language is relatively indirect, elaborate, contextual, and affective, and men's language is relatively direct, succinct, personal, and instrumental.[266]

What do we make of the connection between the law of precatory language and the psychology of gender and language? Given that men tend to use more direct, assertive, and explicit language, are they less likely to use precatory language in a will? And if women are using cooperative, hedged, tentative statements, are they more likely to use precatory language in a will? If gender plays a significant role in the language people choose in their wills, should courts still give any credence to whether the terms used are explicit or precatory? The substantial empirical data collected and analyzed for this Article suggest that the answer to all of these questions is yes. Women are indeed more likely to use precatory language than men, but the selection of precatory language also tells us something about what the person who chose the language wanted. The following discussion will begin with an explanation of

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262. *See, e.g.*, GRAY, *supra* note 27 (discussing relationship advice, relationship coaching, matchmaking guidance, and merchandise).

263. *See generally* Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogation*, 103 YALE L.J. 259 (1993) (discussing how gendered language may be relevant in the context of criminal procedure).

264. Leaper & Smith, *supra* note 159, at 1016, 1018.

265. Carli, *supra* note 197, at 945-46.

266. Mulac, *supra* note 141, at 136.

the way the research was designed and conducted and will then provide a statistical analysis of the data and explain what readers may conclude from it.

A. *Empirical Research: Survey Design and Methodology*

The empirical research for this Article consisted of a twelve-question multiple-choice survey, in addition to several demographic questions, administered online through the website zoomerang.com. The survey was administered to 324 individuals in July of 2006. The subjects were a nationally representative sample that was balanced on factors of age, race, income, state of residence, and sex.[267] Detailed demographic information on the subjects is included in the Appendix.

The survey consisted of three sections. In the first section, subjects were presented with five questions, each posing two alternative ways of phrasing a bequest: a way in which traditional precatory language was used ("suggest," "advise," "request," "hope," or "wish") and a way in which nonprecatory language was used ("direct," "specify," "require," "state," or "order"). Subjects responded whether they would prefer the first way the gift was phrased or the second way the gift was phrased. The order of presentation of the precatory and nonprecatory options was randomized electronically. A full list of the alternatives presented appears in the Appendix.

The second section of the questionnaire posed a single question: whether individuals intended their language to be legally binding. Specifically, subjects were asked:

> Imagine that you have appointed a dependable and competent individual as your Will's Executor (the person responsible for administering your estate). Which of the following results would you want your Will to have on the discretion of your Executor?
> A. I want my Executor to be legally bound to follow the directions I have given precisely as written in my Will.
> B. I want my Executor to be not legally bound to follow the directions I have given precisely as written in my Will, but instead to be guided by the directions and trusted to respect my wishes.

This question was included to determine two questions: first, to determine whether there is a difference between men and women as to whether they intend to create a trust—perhaps women may use precatory language more often than men, but be equally interested in insuring that their directions be binding; second, to determine whether there is a difference between the precatory language users and the nonprecatory language users. If users of precatory language are as likely as those who avoid it to intend to create a trust,

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267. The subjects were provided (for a fee) by MarketTools, Inc., which is associated with Zoomerang and provides resources for those looking to conduct surveys.

perhaps the assumption that this "weak" language shows lack of intent should be discarded.

In the third section, subjects were presented with a series of six excerpts from hypothetical wills and were asked to indicate whether the subject believed the statement would be more likely to be used by a man or by a woman in his or her Last Will and Testament (based upon the subject's personal experiences with the way that men and women express themselves). Three of the six excerpts used precatory language ("ask," "desire," and "recommend") and three used nonprecatory language ("instruct," "insist," and "compel"). The questions posed are included in the Appendix. The third section of the questionnaire was included to protect against self-reporting bias. In this third section, subjects identified the language they expected third parties would use; it is possible that an individual's skill in identifying the tendencies of others may be more realistic than an analysis of his or her own behavior.

To protect against subjects varying the language they prefer based upon whether the listener (the gift recipient) was male or female, the survey used gender-neutral names and avoided gender-specific pronouns.[268] For the most part, relatively rare names were used to minimize the possibility that subjects based their answers on personal beliefs about a how a specific individual that the subject knew (bearing the name used in the question) would behave.[269] For the same reason, the survey avoided references to family members or familial relationships.

The survey methodology was also designed to minimize the risk of sampling error and non-response bias. Because subjects were provided by a business that specializes in human subjects research, the data actually collected—and not just the group sampled—reflected a nationally representative sample balanced on factors of age, sex, race, and geography.

The results of the questionnaire were analyzed using statistical analyses, and the calculations were performed using Excel and SPSS spreadsheet functions. The statistical test appropriate for several of the calculations was the

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268. The names used in the survey are considered gender-neutral, although some may be more common for males and some more common for females. *See* BRUCE LANSKY, THE VERY BEST BABY NAME BOOK IN THE WHOLE WIDE WORLD 8-32 (2005). Whether a given name is more common for males or for females varies by year. *See* Social Security Administration, Popular Baby Names, http://www.ssa.gov/OACT/babynames/ (last visited June 19, 2006).

269. It is also possible that people bear stereotypes based on the names chosen and that those stereotypes may influence their answers, even if they do not know a particular individual bearing the name in question. *See* BRUCE LANSKY AND BARRY SINROD, THE BABY NAME PERSONALITY SURVEY (1990) at vii. For example, Lansky and Sinrod's research indicates that people believe a woman named Alyssa, such as the author of the Article, would be "a pretty, sweet, feminine woman who is either active and lots of fun or refined and rather prissy." *Id.* at 29. However, there is no reason to believe that any potential influence of any predisposed conceptions as to names would be different for men than for women.

chi square test.[270] This test determines the probability that a sample was drawn from a population with a given distribution;[271] in other words, whether the split between the categories observed in the data set collected is likely to be an accurate reflection of the split in the "real world." Where a researcher wants to determine whether observed data is truly "different" between two categories, the calculation is performed by comparing the data collected from actual observations to the distribution of the data that would have been expected if there were no differences between the groups.[272] Where the probability that the observed distribution occurred by chance is very low (less than 5%; ideally less than 1%), one can conclude with a strong degree of confidence that the differences demonstrated between the groups in the sample accurately reflect differences between the groups in the population from which the sample was drawn.

For the remaining statistical analyses, analysis of variance (ANOVA) was used.[273] An ANOVA determines whether the differences between the means of a group of samples are statistically significant—whether the difference that exists is likely explained by chance or by a true difference between the sets.[274] The calculation compares the variability of the samples, and uses the resulting ratio to determine the significance of the result.[275] Like the chi square test, where the results indicate that the probability that the observed difference in variance occurred by chance is very low (less than 5%; ideally less than 1%), one can conclude with a strong degree of confidence that the differences demonstrated between the groups in the sample accurately reflect differences between the groups in the population from which the sample was drawn.

B. *Empirical Research: Results*

1. Sex and Precatory Language

The data show that women are indeed more likely than men to use precatory language. To measure this tendency, the average number of times women chose the precatory options ("suggest," "advise," "request," "hope," or "wish") as opposed to the nonprecatory options ("direct," "specify," "require,"

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270. The chi square analysis is based upon the formula $x^2 = \sum[(f-F)^2/F]$, where F is the predicted frequency and f is the observed frequency. *See* DONALD J. KOOSIS, STATISTICS: A SELF-TEACHING GUIDE (4th ed.) 210-11 (1997).

271. For an overview of the chi square test, see *id.* at 209-29. *See also* Georgetown Linguistics Chi Square Tutorial, http://www.georgetown.edu/faculty/ballc/webtools/web_chi_tut.html (last visited Aug. 27, 2006).

272. *See* KOOSIS, *supra* note 270, at 212-14.

273. For a discussion of analysis of variance, see *id.* at 153-80.

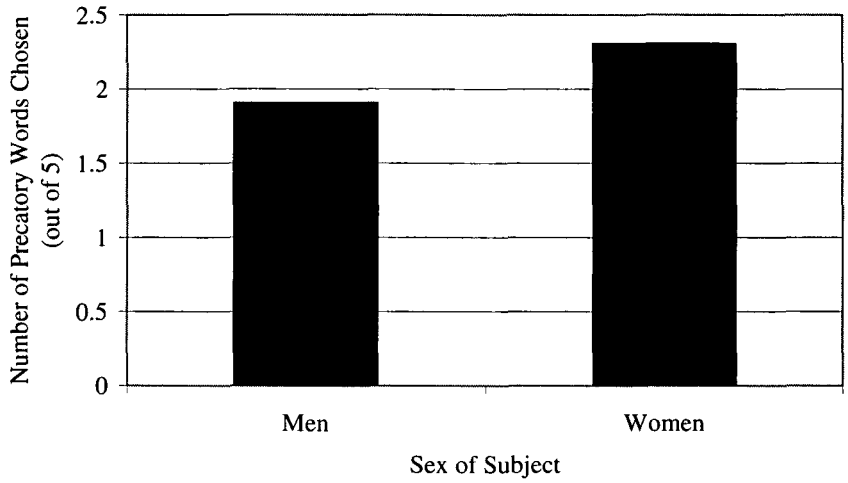
274. *See id.* at 153-54.

275. The formula for the resulting ratio (referred to as "F"), is $F = s_1^2/s_2^2$, where s_1 is the standard deviation of the first sample and s_2 is the standard deviation of the second sample. *Id.* at 154.

"state," or "order") was contrasted with the average number of times men chose the precatory options as opposed to the nonprecatory options. Because there were five questions, subjects received a score between 0 (no precatory options selected) and 5 (all precatory options selected). The breakdown among the categories was as follows:

	Mean Number of Precatory Choices	**Variance**
Men	1.9068	2.4724
Women	2.3067	2.2017

Men vs. Women: Choice of Precatory Words



To determine whether the difference between men and women was statistically significant, an ANOVA was run on the data. The analysis revealed that there is a statistically significant difference between the sexes, with an F value of 5.545.[276] This corresponds to a probability that these results were obtained by chance of 0.019 (1.9%). The results therefore show that there is a

276. The SPSS analysis produced the following output:

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	12.954(a)	1	12.954	5.545	.019
Intercept	1438.040	1	1438.040	615.540	.000
Sex	12.954	1	12.954	5.545	.019
Error	752.265	322	2.336		
Total	2205.000	324			
Corrected Total	765.219	323			

a R Squared = .017

significant difference between the sexes, with a roughly 98% degree of certainty.

The ANOVA shows that we have a strong degree of confidence that there is a difference between men and women in their choice of precatory language, but we must turn to the calculation of the correlation coefficient to determine the scope of this difference.[277] The calculation for this data returned a value of $r = 0.13011$. This indicates a covariance[278] between sex and precatory language of roughly 0.016929—put another way, sex explains roughly 1.7% of the variability in precatory language.[279]

The data therefore indicate, with a statistically high degree of confidence, that women are more likely to use precatory language than men and that sex is responsible for about 1.7% of the variation in precatory language choice. Note that both men and women are more likely to prefer nonprecatory language to precatory language; this preference, however, is stronger in men than it is in women. The difference in language choice is consistent with what psychological theories would have predicted: men tend to prefer direct, absolute language, while women are more likely to hedge and prefer an indirect approach.

2. Sex Perceptions and Precatory Language

If women are in fact more likely to use precatory language than men, it should come as no surprise that subjects can identify precatory language as more likely to be used by a woman. The data, in fact, do support this hypothesis. With the exception of one term ("insist"),[280] subjects consistently rated the precatory words as more likely to be used by a woman and the nonprecatory words as more likely to be used by a man. The data were as follows:

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277. The correlation coefficient is a statistic that shows the strength of a relationship between two variables. *See* KOOSIS, *supra* note 270, at 187. The basic formula to calculate the correlation coefficient (r) is: $r = 1/(n-1) \sum (x - _)/s_x \cdot (y - _)/s_y$, where n is the sample size, x is each measurement of x, _ is the mean of x, s_x is the standard deviation of x, y is each measurement of y, _ is the mean of y, s_y is the standard deviation of y. *Id.* at 189. When r = 1, the two variables are perfectly correlated: one predicts 100% of the other. When r = 0, there is no relationship between the variables; knowing about one variable gives you no information about the other. *Id.* at 188. When r is between 0 and 1, there is some relationship between the variables; the higher the r value, the stronger the relationship. *Id.*

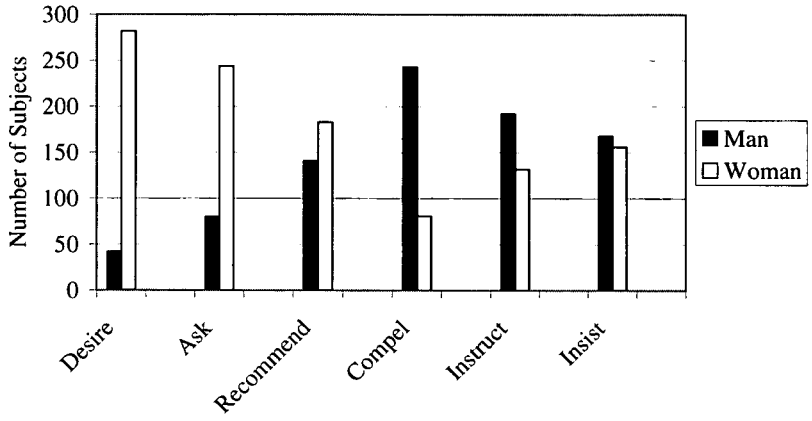
278. The covariance is the square of the correlation coefficient. *Id.* at 192.

279. The finding of a 1.7% covariance on this data is consistent with the estimate of some researchers that that gender accounts for about one percent of the variance observed in communication in general. *See* Anderson, *supra* note 138, at 83-84. Gender accounts for about one percent of the variance observed in communication in general. *See id.*

280. This question reads as follows: "I leave my dog to Jackie, but insist that Jackie give the dog to Jean if Jackie can no longer care for it." Although subjects were instructed to "pay particular attention to the underlined words in each sentence," perhaps the item being transferred in this case—a beloved pet—influenced subjects' responses more than the underlined word did.

	Man	Woman
Desire	42 13%	282 87%
Ask	80 25%	244 75%
Recommend	141 44%	183 56%
Compel	243 75%	81 25%
Instruct	192 59%	132 41%
Insist	168 52%	156 48%

Subjects' Identification of Language as Used by Man or Woman



Word Judged (First Three Are Precatory)

A chi square analysis was performed to determine whether the difference between men and women was statistically significant; it was. On each individual variable except one,[281] the difference between men and women was significant to a confidence degree of at least 98%,[282] and on four of the variables the confidence level exceeded 99.9%.[283] The data reveal strong

281. The difference for the term "insist" was not statistically significant, with a chi square value of only 0.4444 and corresponding probability of error of 0.504985, although the trend was in the predicted direction.

282. The chi square calculation for "recommend" returned a value of 5.444444 and a probability of 0.019631, for a degree of confidence of roughly 98.0369%.

283. The chi square calculation for "instruct" returned a value of 11.111111 and a probability of 0.000858, for a degree of confidence of roughly 99.9142%. The calculations for "ask," "desire," and "compel" returned chi square values of 83.01235, 177.7778, and 81, respectively, well exceeding the critical value of 10.83 required for a probability of less than 0.001, for a degree of confidence of better than 99.999%.

support for the conclusion that people do indeed identify precatory words as female language and nonprecatory words as male language.

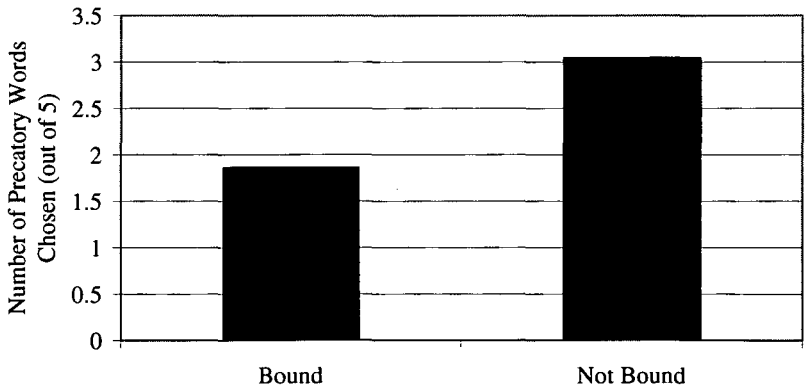
3. Precatory Language and Intent to Bind the Executor

Given that precatory language appears to be largely "feminine," one might question whether the use of precatory language truly indicates that the user of the language intends for the direction not to be legally binding. If the use of precatory language is simply a facet of feminine language and is not intended to convey whether the direction is to be binding, the use of precatory words should not be a key consideration for courts in determining if a trust has been created.

The data, however, provide strong support for the conclusion that precatory words do in fact demonstrate an intent not to create a trust. The data are as follows:

	Mean Number of Precatory Language Choices	**Variance**
Intend executor to be legally bound	1.8638	2.0947
Do not intend executor to be legally bound	3.045	2.3464

Intend Executor Bound vs. Intend Executor Not Bound:
Choice of Precatory Words



Note that individuals who intended their executors to be bound were roughly twice as likely to select nonprecatory language choices over precatory language choices, whereas individuals who wished their executors not to be bound were roughly twice as likely to select precatory language choices over nonprecatory language choices. People who wanted their executors to be bound were over six times as likely to choose a nonprecatory direction than a precatory one; individuals who did not intend to legally bind their executor were almost twice as likely to select precatory language than nonprecatory language.

An ANOVA was performed to determine if there was a statistically significant difference between the groups, and the analysis confirmed that the magnitude of this difference is strong. The analysis returned an F value of 34.534, with the degree of confidence exceeding 99.999%.[284] We can therefore say with near-complete certainty that whether an individual intends his or her executor to be bound influences whether he or she will select precatory language.

The ANOVA shows that we have a strong degree of confidence that there is a difference between binders and nonbinders in their choice of precatory language, and the calculation of the correlation coefficient helps explain the scope of this difference. The calculation for this data returned a value of $r = 0.311225$. This indicates a covariance between intent to bind the executor and precatory language of roughly 0.09681—put another way, whether an individual intended his executor to be bound explains roughly 9.7% of the variability in precatory language. This analysis is compelling and indicates that the choice of precatory language does indeed shed light on the donor's intent.

The data also indicate, however, that intent to bind the executor is clearly not the only factor at work in a testator's selection of precatory language. After all, over a third of the individuals who did not intend to bind their executors used nonprecatory language, and almost half of the individuals who did intend to bind their executors chose the precatory language. Courts cannot assume, therefore, that precatory language alone is a complete indication of intent. Other factors contribute to the selection of language—most notably, gender. However, the use of precatory language is in fact a strong indicator that the testator did not intend to create a legally binding trust.

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284. The SPSS analysis produced the following output:

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	74.120(a)	1	74.120	34.534	.000
Intercept	1280.490	1	1280.490	596.612	.000
executor	74.120	1	74.120	34.534	.000
Error	691.099	322	2.146		
Total	2205.000	324			
Corrected Total	765.219	323			

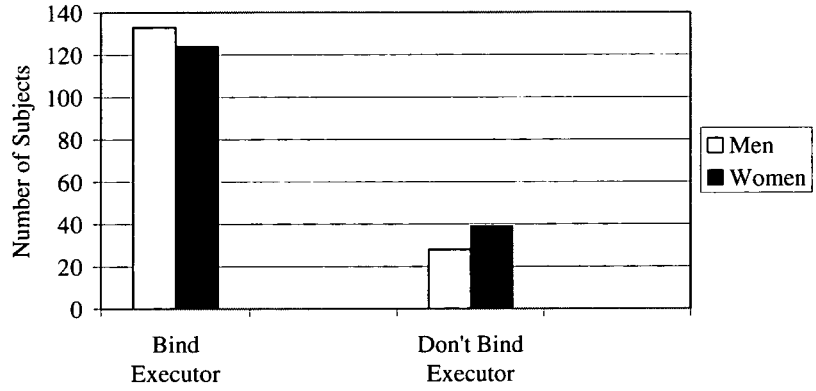
a R Squared = .097

4. Sex and Intent to Bind the Executor

Given that women are more likely to favor precatory language and those who favor precatory language are less likely to intend to legally bind their executors, one might predict that women are less likely to intend to bind their executors. Although there is a trend in this direction, the difference between the sexes is not statistically significant.[285] The data are as follows:

	Men	Women
Intend executor to be legally bound	133 (82.6%)	124 (76.1%)
Do not intend executor to be legally bound	28 (17.4%)	39 (23.9%)

Men v. Women: Intent to Bind Executor



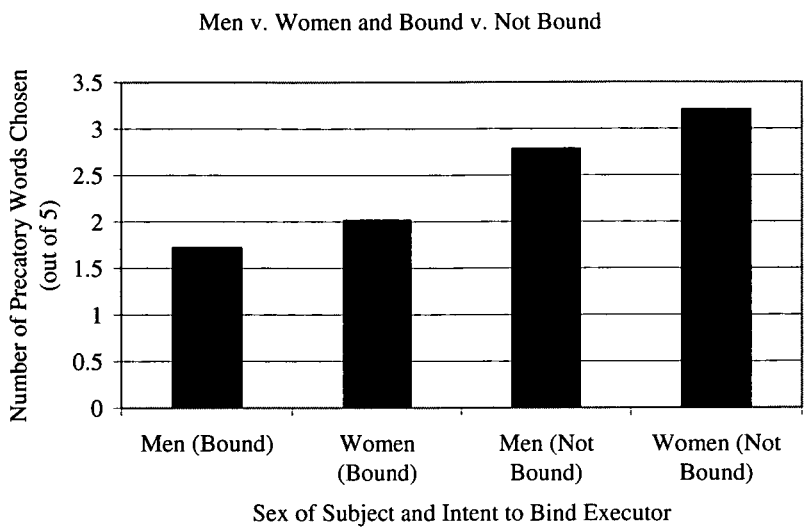
285. A lack of a statistically significant finding does not mean that the hypothesis is false, but merely that there is not sufficient support to conclude with certainty that the hypothesis is true. Perhaps a significant finding would be revealed with a larger sample size or under other circumstances.

Although women were less likely than men to intend to bind their executor, the chi square analysis showed insufficient support for this hypothesis. There is a trend in the anticipated direction, but we cannot rely on this trend because the degree of confidence the analysis provides on this point is too low.[286] In this sample group, nearly a quarter of women intended to allow their executors discretion without being legally bound, as opposed to only about a sixth of men. Although this difference is not statistically significant in this sample, it may indicate an area that is ripe for further research.

To get a more detailed look at how men and women may choose precatory language differently, we can compare the means and variances within the subgroups of men/women and binders/nonbinders. The data show that women tend to use precatory language more often than men, both in the situation where the subject intended the executor to be bound and in the situation where the subject did not intend the executor to be bound. The following table and graphic presents that data:

	Mean Number of Precatory Language Choices	**Variance**
Men: Intend to Bind Executor	1.7218	2.2629
Women: Intend to Bind Executor	2.0161	1.886
Men: Intend Not to Bind Executor	2.7857	2.6189
Women: Intend Not to Bind Executor	3.2038	2.1293

286. The chi square analysis returned a value of 2.10888, with a P of 0.146447. This does not give us greater than 95% confidence—or even 90%—and therefore is not statistically significant.



The chart demonstrates the two factors at work. Our earlier analyses demonstrated that women were more likely to use precatory language than men and people who intended to grant discretion to their executors were more likely to use precatory language than those who intended to bind their executors. We can now see that within both categories of binding preference, women still tend to use precatory language more than men do. A man who intends to bind his executor is prone to use the most direct and explicit language of the four groups, and a woman who intends to leave her executor discretion is prone to use the most precatory language.

C. *Discussion*

Many factors affect whether an individual chooses to include precatory language in his or her will. Courts have long assumed—rightly, it seems—that one factor that influences whether a testator chooses precatory language is whether he or she intends to create a legally binding trust. The results of the empirical data, however, show that the choice of precatory language is a far more complicated matter involving several other criteria, not the least of which is the gender of the testator.

Because the data show that people who use precatory language are less likely to intend to bind their executors and that men are less likely than women to use precatory language, what additional conclusions can we draw? It would seem that when a man chooses precatory language, this choice is very strong indication that he does not intend to create a legally binding trust. One cannot

assume that he is choosing the language based on his gender socialization (as the precatory language choices are antithetical to stereotypically masculine language), and there is a strong correlation between selection of precatory language and intent not to bind. Likewise, when a woman chooses nonprecatory language, this can be seen as a strong indication that she does in fact intend to bind her executor; her stereotypically feminine language leanings would have produced the alternate result, and use of nonprecatory language and intention to bind are strongly correlated. It is when men and women's language choices align most closely with what we expect from gender psychology that we should be most skeptical that their phraseology accurately reflects their intentions. If a man uses nonprecatory language or a woman uses precatory language, they may very well mean it—or they may be merely exhibiting the language tendencies characteristic of their respective genders.

In assessing the conclusions we should draw from this data, the question arises as to whose language is it that we are construing: the words of the testator or the words of the drafting attorney?[287] When a female client comes into the office of a male attorney, expressing her "wish" that jewelry pass to her daughters after her sister's death, will the male attorney translate that "wish" into a "command"? And might a female attorney, interviewing a male client who seeks to "order" his wife to allow his children in the family home, soften the "order" into a "request"? Or do attorneys accurately transcribe the expressions of their clients, without adding in their personal biases (whether influenced by gender or otherwise)?

The data gathered by this study cannot offer a definitive response to these questions. It is notable that only 31% of survey responses had a current will, and it is unclear whether legal counseling of the remaining majority might have altered word choice. It is possible that the process of counseling a client through the will drafting process would alter the results of this study, either by substituting the drafter's language choices for the clients or by influencing the clients as to how to express their preferences or what those preferences are.

It is also notable that a large portion of wills—and, it would seem, an even larger portion of ambiguously-drafted wills[288]—are written without the aid of the attorney. In this sample, roughly a third of subjects who had a will drafted their own. In wills that are brought to trial to construe ambiguous language, doubtless many (perhaps even a majority) are written without the aid of legal

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287. Uncertainty whether actions reflect choices of the attorney or choices of the client is a challenge when analyzing the law of wills and trusts. For example, in *Perpetual Trusts and the Settlor's Intent*, Professor Joshua Tate acknowledges that the proliferation of articles and promotional materials touting the virtues of dynasty trusts are not "direct evidence of the intentions of testators," but concludes that the materials likely "speak[ ] to the fears and desires of at least a few settlors." Tate, *supra* note 131, at 612.

288. This assumes that attorneys who practice in the area of trusts and estates have superior drafting ability than laypeople, attorneys having been enlightened by rigorous law school courses focusing on wills and having honed their skills through practice.

advice.[289] Clearly, in these cases, it is the language of the testator only that is at issue.

Another question this study raises is whether the gender of the listener—the person construing the document as executor, trustee, or judge—affects how the language is interpreted. Might a female judge or executor interpret a "request" more or less firmly than a male judge or executor would? The data indicate that both men and women identify sex stereotypes in language,[290] but did not reach whether they would interpret the masculine language to be more binding on an executor than the feminine language. It is also possible men and women may assess language used by the opposite sex differently (perhaps less accurately) than language used by member of the same sex. The data of this study does not address this issue, but it may be a question for further research.

Another shortfall of the data is that it categorized respondents based on biological sex (male or female) rather than sociological gender (masculine or feminine). It is unclear whether the tendency to prefer "soft" language is an aspect of gender, an aspect of sex, or both. This shortfall makes it particularly challenging to draw any conclusions about men and women who possess substantial social characteristics of the opposite gender: masculine women and feminine men. It is also unclear what impact, if any, sexual orientation would have on the results of this study. Perhaps further research can address these concerns. Until then, perhaps the best conclusion is that practitioners with cross-gendered clients ought to be particularly careful in determining what these clients intend with their language.

Although the data can be criticized on various grounds, this empirical psychological research can guide courts to engage in a fuller, more accurate assessment of what it means when a testator chooses to transfer property with a "recommendation" instead of a "command." Empirical data and the social sciences have a good deal to offer legal rules. To the extent courts purport to be effectuating the "intent" of the testator—a subjective, psychological issue—courts are better suited to making those kinds of decisions with an understanding of the social science behind the linguistic choices people make.

This Article is not the first to propose that courts look beyond the naked language of the document to determine true testamentary intent. Professor Adam Hirsch has noted the inconsistency between the courts' claim to uphold

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289. Hence the famous poem of Lord Neaves:

"Ye lawyers who live upon litigants' fees,
And who need a good many to live at your ease,
Grave or gay, wise or witty, whate'er your degree,
Plain stuff or Queen's Counsel, take counsel of me.
When a festive occasion your spirit unbends,
You should never forget the Profession's best friends;
So we'll send round the wine and bright bumper fill,
To the jolly testator who makes his own will."

Lord Neaves, *Jolly Testator Who Makes His Own Will.*

290. See Part III of the survey.

an individual's testamentary intent while disdaining the testator's individualistic language use in favor of the plain meaning rule.[291] One commentator recently suggested that courts integrate a "descriptive linguistics" approach to will interpretation, in which courts would consider an individual's own personal use of words as a tool to aid construction, rather than relying upon the plain meaning rule to supply a uniform definition to language that may be idiosyncratic.[292] The conclusion reached by this Article is consistent with those: that if the law is to give any true respect to the notion of testamentary intent, courts must give greater credence to ascertaining the intended meaning of the language the testator chose.

V. CONCLUSION

The law of precatory language in wills is complicated and unpredictable. While attempting to give credence to the true intent of the testator, courts engage in subjective assessments of subjective desires, which is destined in some cases to provide inaccurate results. For the most part, when a testator uses precatory language, this language signals to a court that the testator may not intend to create a legally binding trust. Although this intuition is often correct, courts can come closer to meeting their difficult burden of accurately assessing subjective intention with a fuller awareness of psychological principles.

Although people are more likely to choose precatory language when they do not intend to create a legally binding trust, their desire to bind or not bind is not the only factor that determines the language they choose. The language we use is determined both by socialization and biological factors and varies greatly based on sex. Specifically, men and women tend to choose different words, sometimes without full regard to the legal implications of the words chosen.

What implications does our heightened understanding of gender and precatory language have for courts, legal scholars, and practicing attorneys? For courts, the analysis of testator intent in the context of precatory language should become more robust and inter-disciplinary, with added attention to what social scientists know about psychology of gender. For legal scholars, psychology—including psychology of gender—is a key component in fully realizing the ideal of testator intent, which is the cornerstone of wills law. The social science aspects of trusts and estates law deserve more attention and research. Finally, for practicing attorneys, focusing closely on what the client truly intends and being aware that men and women may express themselves differently will allow attorneys to better transcribe directions that are the

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291. *See* Hirsch, *supra* note 131. Professor Hirsh criticizes courts' refusal to "explore subjective sense in the course of construing the text of a will." *Id.* at 1117.

292. *See* Jarboe, *supra* note 131. Jarboe notes, "Courts that eschew extrinsic evidence of a testator's intent and rely solely on the will's language run the risk of interpreting the testator's language according to traditional rules of grammar that might not apply to this particular user of English." *Id.* at 1369-70.

client's and not the attorney's. When attorneys ask sufficient questions to determine whether the words the client is using to express himself or herself are accurately conveying the level of control he or she wishes to retain over the property, they can better create the conditions the client wants.

So would the current law of precatory words and trusts fail Marilyn Monroe? Is it right to construe her expressions of desire as mere wishes on a star? Although we can never know what Marilyn really wanted, perhaps courts are doing their best to give respect to the true wishes of the donor, including when those wishes are something short of a legally binding trust. Courts can make further progress toward this admirable goal by realizing that precatory language is a complex variable, influenced not only by the donor's intentions, but also by his or her gender and unique individuality. After all, as Marilyn once said, "Everyone's a star and deserves the right to twinkle."[293]

293. The Quotations Page, http://www.quotationspage.com/search.php3?Search=&Author=Marilyn+Monroe&C=coles&C=lindsly&C=poorc&C=net&C=devils&C=contrib&page=3 (last visited Aug. 8, 2006).

Appendix

The following chart sets out the survey that was administered and summarizes the results that were obtained. Please note that the order in which alternatives were offered was randomized for questions one through six.

Language Survey

This brief survey measures your opinions about language and your preferences in language choice. The survey is for academic non-profit purposes. It consists of twelve multiple-choice questions and should only take a few minutes. You must be at least 19 years old to participate. This survey has been approved by the Samford University Institutional Review Board.

The five questions that follow ask about your preferences for language used in a Last Will and Testament (a document that explains how your property will be distributed at your death). Assume that you are choosing the way a gift would be phrased in your own Will. In each pairing of sentences that follow, indicate the one in each pair in which you prefer the way the gift is phrased:

1. Which phrasing do you prefer?		
I leave the sum of $10,000 to Terry, and direct that Terry use this money to pay off our family's debts.	177	55%
I leave the sum of $10,000 to Terry, and suggest that Terry use this money to pay off our family's debts.	147	45%
Total	324	100%

2. Which phrasing do you prefer?		
I leave my entire estate to my college, and advise that the college use the proceeds for its scholarship fund.	63	19%
I leave my entire estate to my college, and specify that the college use the proceeds for its scholarship fund.	261	81%
Total	324	100%

3. Which phrasing do you prefer?		
I leave my collectables to Drew, and require that Drew leave them to our local museum at death.	114	35%
I leave my collectables to Drew, and request that Drew leave them to our local museum at death.	210	65%
Total	324	100%

4. Which phrasing do you prefer?		
I leave my stock portfolio to Alex, and hope that Alex shall donate the dividends to our town fire department.	97	30%
I leave my stock portfolio to Alex, and state that Alex shall donate the dividends to our town fire department.	227	70%
Total	324	100%

5. Which phrasing do you prefer?		
I leave my family home to Cameron, and order that Cameron allow Robin to reside there as well.	158	49%
I leave my family home to Cameron, and wish that Cameron would allow Robin to reside there as well.	166	51%
Total	324	100%

6. Imagine that you have appointed a dependable and competent individual as your Will's Executor (the person responsible for administering your estate and carrying out the terms of your Will). Which of the following results would you want your Will to have on the discretion of your Executor?		
I want my Executor to be legally bound to follow the directions I have given precisely as written in my Will.	257	79%
I want my Executor to be not legally bound to follow the directions I have given precisely as written in my Will, but instead to be guided by the directions and trusted to respect my wishes.	67	21%
Total	324	100%

For the following six questions, think about your personal experiences with the way that men and women choose words to express themselves. For each question, indicate whether you believe the statement would be more likely to be used by a man or by a woman in his or her Last Will and Testament. Pay particular attention to the underlined word in each sentence:

7. Is the following statement more likely to be used by a man or a woman? "I leave all of my cash savings to Taylor, and instruct that Taylor use it toward the education of Taylor's children."		
Man	192	59%
Woman	132	41%
Total	324	100%

8. Is the following statement more likely to be used by a man or a woman? "I leave my books to Frankie, and ask that Frankie give ten of them to the local library."		
Man	80	25%
Woman	244	75%
Total	324	100%

9. Is the following statement more likely to be used by a man or a woman? "I leave my furniture to Riley, but desire that Riley distribute the dining room set to Jesse."		
Man	42	13%
Woman	282	87%
Total	324	100%

10. Is the following statement more likely to be used by a man or a woman? "I leave my dog to Jackie, but insist that Jackie give the dog to Jean if Jackie can no longer care for it."		
Man	168	52%
Woman	156	48%
Total	324	100%

11. Is the following statement more likely to be used by a man or a woman? "I leave my interest in the business to the Vice President of the company, and compel the distribution of the past year's profits to our employees."		
Man	243	75%
Woman	81	25%
Total	324	100%

12. Is the following statement more likely to be used by a man or a woman? "I leave my cars to Jayme, and recommend that Jayme sell them to raise funds to support Regan's retirement."		
Man	141	44%
Woman	183	56%
Total	324	100%

Finally, please answer a few questions about yourself and your background:

13. In what state do you currently live?		
Alabama	5	2%
Alaska	1	0%
Arizona	9	3%
Arkansas	3	1%
California	35	11%
Colorado	7	2%

Connecticut	2	1%
Delaware	1	0%
Florida	16	5%
Georgia	10	3%
Hawaii	2	1%
Idaho	1	0%
Illinois	17	5%
Indiana	8	2%
Iowa	8	2%
Kansas	7	2%
Kentucky	4	1%
Louisiana	4	1%
Maine	1	0%
Maryland	4	1%
Massachusetts	2	1%
Michigan	15	5%
Minnesota	2	1%
Mississippi	3	1%
Missouri	12	4%
Montana	0	0%
Nebraska	4	1%
Nevada	3	1%
New Hampshire	0	0%
New Jersey	10	3%
New Mexico	1	0%
New York	11	3%
North Carolina	12	4%
North Dakota	0	0%
Ohio	17	5%
Oklahoma	3	1%
Oregon	6	2%
Pennsylvania	17	5%
Rhode Island	1	0%
South Carolina	1	0%
South Dakota	0	0%
Tennessee	4	1%
Texas	27	8%
Utah	1	0%
Vermont	0	0%
Virginia	6	2%
Washington	10	3%
West Virginia	3	1%
Wisconsin	7	2%
Wyoming	1	0%
Total	324	100%

14. Are you a man or a woman?		
Man	161	50%
Woman	163	50%
Total	324	100%

15. What is your marital status?		
Single	71	22%
Cohabiting with Significant Other	25	8%
Married	182	56%
Separated	2	1%
Divorced	26	8%
Widowed	16	5%
Prefer not to answer	2	1%
Total	324	100%

16. How old are you?		
19	9	3%
20	5	2%
21	7	2%
22	4	1%
23	13	4%
24	10	3%
25	7	2%
26	6	2%
27	6	2%
28	8	2%
29	6	2%
30	7	2%
31	8	2%
32	7	2%
33	6	2%
34	6	2%
35	4	1%
36	8	2%
37	6	2%

38	5	2%
39	7	2%
40	7	2%
41	7	2%
42	5	2%
43	7	2%
44	7	2%
45	3	1%
46	9	3%
47	6	2%
48	8	2%
49	5	2%
50	6	2%
51	4	1%
52	0	0%
53	9	3%
54	6	2%
55	4	1%
56	7	2%
57	3	1%
58	7	2%
59	4	1%
60	4	1%
61	2	1%
62	1	0%
63	8	2%
64	1	0%
65	6	2%
66	0	0%
67	2	1%
68	2	1%
69	0	0%
70	2	1%
71	4	1%
72	2	1%
73	1	0%
74	6	2%
75	4	1%
76	3	1%
77	2	1%
78	5	2%
79	0	0%
80	0	0%
81	3	1%
82	2	1%

83	2	1%
84	0	0%
85	0	0%
86	1	0%
87	0	0%
88	0	0%
89	0	0%
90	0	0%
91	0	0%
92	0	0%
93	0	0%
94	0	0%
95	0	0%
96	0	0%
97	0	0%
98	0	0%
99	0	0%
100+	2	1%
Total	324	100%

17. What is the highest level of education that you have received?		
Did not complete grade school	0	0%
Grade School	1	0%
High School or GED	87	27%
Some College	114	35%
Associate's Degree	27	8%
Bachelor's Degree	68	21%
Master's Degree	18	6%
Juris Doctor Degree	1	0%
Ph.D or other Doctorate Degree	8	2%
Total	324	100%

18. What is your gross annual household income?		
Less than $10,000	13	4%
$10,000-$25,000	41	13%
$25,000-$50,000	122	38%
$50,000-$75,000	66	20%

$75,000-$100,000	35	11%
$100,000-$125,000	16	5%
$125,000-$150,000	7	2%
$150,000-$175,000	4	1%
$175,000-$200,000	3	1%
$200,000-$250,000	2	1%
$250,000-$300,000	1	0%
$300,000-$400,000	3	1%
$400,000-$500,000	0	0%
$500,000+	0	0%
Prefer not to answer	11	3%
Total	324	100%

19. Which of the following ethnic groups best describes you?

White/Caucasian	263	81%
Latino/Hispanic/Spanish	14	4%
Black/African-American	24	7%
Asian	11	3%
Middle Eastern	1	0%
Other/No Answer	11	3%
Total	324	100%

20. Do you have a Last Will and Testament?

Yes, I drafted my own.	37	11%
Yes, an attorney drafted one for me.	66	20%
No.	219	68%
Not sure.	2	1%
Total	324	100%

Thank you for your time in completing this survey. You have helped foster a stronger understanding of the way people express themselves in testamentary documents. We appreciate your contribution.