courtroom language.

As well as sometimes participating in court cases, forensic linguists also have an academic interest in the workings of the court- room. They have performed analyses of courtroom questioning by lawyers, of witness language and of judges’ language in their rulings and in their instructions to juries. Through analysis of language, understanding can be gained of how power works in the courtroom, of how witnesses are likely to respond to certain types of questions and of what is likely to confuse or inform juries. One area which has been well examined is that of rape trials. The crime of rape is clearly a very serious one and whether someone is convicted can depend upon the question of consent. Consent, (i.e. whether the alleged rape victim agreed to have sex) is predominantly a question of communication and thus language use. A further issue often given prominence by feminist researchers is the way women victims of rape are treated by the legal system. It is argued that the process and in particular the opposing lawyers can create a very negative experience for the woman which can amount to re-victimization. It can further be argued that society’s wider attitudes to sexual behaviour and relationships between the sexes can all be examined through the microcosm of a rape trial.

One example of a linguistic analysis of rape trials is Susan Ehrlich’s (2001) work. She examines battles between the accused and the prosecuting lawyer as revealed in their grammatical usage. Thus Ehrlich shows how the lawyer’s questions presuppose the defendant’s responsibility for his actions: ‘you proceeded to touch her’, ‘you laid down beside her’ and ‘you then started kissing her’. The defendant’s response is to diffuse this and represent the actions back to the lawyer as joint actions; ‘we started kissing’, ‘we started to fool around again’ or actions of indeterminate nature ‘all our clothes at one point were taken off and we were fooling around’. As well as giving insight into the tactics of legal examination, Ehrlich examines how the various participants in the trial have opposing conceptions of the nature of consent. When the defendant is asked how he knows that ‘this wasn’t something that she didn’t want to do’ he replies ‘she never said “no”, she never said “stop” and when I was kissing her she was kissing me back’ (Ehrlich, 2003, p. 123). This construction of consent as being presumed, unless clearly withdrawn, links with Erhlich’s ideological discussion of USA rape law. Until the 1950s this law required a woman to ‘resist to the utmost’ if unwanted intercourse was to be recognized as rape. It can be argued that although the law has been reformed, the courtroom exchanges reveal that the ideology it reflected still existed.

As well as exchanges between witness and lawyer, courtroom linguists are interested in the communication between judge and jury. One of the judges’ tasks in UK and US trials is to explain the law to juries so that they can apply the evidence of the case to come to their verdict. However, these judicial instructions have multiple audiences: not only are judges talking to the jury and others pre- sent in the courtroom, their words will also be examined carefully to see if there are grounds for appeal to a higher court. Because of this, in some jurisdictions standard, legally watertight instructions have been published. Unfortunately, the concern to be legally watertight has led to some instructions being largely incomprehensible to the ordinary men and women of the jury. Linguists have recently argued for and been involved in attempts to reform these instructions to answer the needs of both audiences. In the UK Chris Heffer argues that jury instructions should be seen as a teaching exercise. Heffer suggests that best under- standing by the jury would be achieved if instructions were given early in a trial and involve repetition and fully relevant examples of how the legal points might be applied to the case being considered. The model, he suggests, should be one of a teacher explaining something complex to a class. The current reality is very far removed from this. There are some examples, when a jury has asked for further explanation of an issue, where the judge has simply re-read the instruction to the jury. Faced with cases like this it may seem that a judge or the legal system is simply being obstinate but the judge has to be cautious; there is good research to demonstrate that how the law is explained to the jury can influence its verdict. For example, in many jurisdictions a jury should only convict a defendant if it believes that the case has been made against them ‘beyond reasonable doubt’. This concept of ‘reason- able doubt’ has been explained to juries in different ways across different jurisdictions. Lawrence Solan charted some of these variations, ranging from ‘actual and substantial doubt’, and ‘not a mere possible doubt’, to ‘not a conjecture or fanciful doubt’ and ‘abiding conviction of guilt’. Solan and other researchers show how these different constructions affect the jury’s decision- making and can lead either to higher or lower conviction rates.

One recent success in linguistic reform of the legal system has been Peter Tiersma’s work with the Californian Judicial Council which in August 2005 agreed new plain language jury instructions. These instructions were the result of a committee to which Tiersma contributed. The reformed instruction on reasonable doubt is given above.

CALIFORNIA JUDICIAL CODE INSTRUCTIONS ON REASONABLE. DOUBT.

Previous instruction (CALJIC 2.90).

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

Reformed instruction (CALCRIM 220).

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

Taken from the website www.languageandlaw.org

legal language reform.

The reform of legal language is not restricted to courtroom situations. If you have ever signed any kind of contract whether for a credit card, a telephone or a property rental agreement you will have encountered legal language. If you have actually read such a contract you may have noticed that it is difficult to understand. In their search for reform, linguists have not only studied the nature of legal language but also tried to understand why legal language is as it is. In their efforts to understand and provide explanations for the difficulties of legal language, linguists have come up with two main answers. The first draws on the history of our legal systems; the second is more functional in trying to understand the purpose of legal language.

Peter Tiersma’s (1999) book on legal language traces the history of the adversarial legal system from its origins in William the Conqueror’s invasion of England in 1066. Before the Norman Conquest, written law appeared either in English or Latin but immediately following the Conquest all legal texts moved into Latin. Over a period of time Norman French became established in England as the language of the ruling class and gradually filtered through to the language of the law. As Tiersma observes, the first French statute does not appear in English law until 1275, more than 200 years after the Conquest. For the next 200 years or so, French became the dominant language of legal texts: the main exceptions to this was in the field of Church law. Henry VII’s defeat of Richard III at the Battle of Bosworth in 1485 brought about abrupt and sweeping legal reforms. Henry was determined to establish his rather shaky claim to the English throne and introduced extensive legal reforms as part of the break with the past. These reforms saw the introduction of English as the language of statutes and parliamentary debates.

Evidence of this history can be found in modern legal language. Norman French influence can be found in vocabulary items such as assault, misdemeanour, slander, tort and so on but also in some grammatical structures. Perhaps the most obvious example is the French ordering of adjectives after the noun, thus giving us court martial, attorney general and letters patent rather than the more Anglicized martial court, general attorney and patent letters. Latin vocabulary and structures are also found. Good examples include habeas corpus (the right to be taken before a court after a certain period of arrest) and mens rea (referring to a person’s culpable mental state with regard to a crime, e.g. intentionally harming someone or driving recklessly). The question as to why these historical structures and phrases remain in the language can be debated. One cynical explanation is that the legal profession has an interest in the language remaining specialized and inaccessible to the lay person. The counter argument to this is that the specialized words and use of words allows for the precision that is necessary in the legal context. One further argument for their maintenance is that the operation of the law requires stability of linguistic meanings. If a law is changed just to reform its language, it is very easy to slightly change its meaning or at least allow lawyers to argue for new interpretations on behalf of their clients.

These arguments in support of the historic use of legal language lead on to the second explanation as to why legal language can be so obscure and difficult to understand. The precision required in legal language requires it to be as context independent as possible. Most language depends on the wider context to be understood. The understanding of language is rarely dependent on the words alone. Not only do we use words like ‘this’ or ‘that’ which may require gestures to accompany them but also we make assumptions relating to social contexts. If I ask ‘How are you?’ I expect different responses if I ask the question at work or at a hospital bedside and the given response depends upon shared know- ledge of what is socially appropriate. Legal language, especially the language of contracts, cannot be like this. It requires precision and understanding to be stable across situation and time. This has led both to a technical vocabulary and repetition of phrases where the meaning has been well established between lawyers. As everyday language moves on and meanings subtly move and change, the technical vocabulary remains static and becomes more and more difficult for the lay person to understand. John Gibbons (2003) provides an example of an Anglo-Saxon will of Wulfwyn showing, amongst other things, how context-dependent it is. Thus Wulfwyn leaves some of his possessions to ‘my lady’ and ‘my royal lord’ without actually naming these individuals and even includes the phrase ‘Stanhard is to have everything I have bequeathed to him’ (Gibbons, 2003, p. 27). In contrast the formulaic modern will requires names and addresses and a specificity not found in the earlier version. In spite of its apparent precise use of language, the modern will still contains curious features and redundancies which relate to the historic language. Gibbons (2003) and Tiersma (1999) both point out that every will is a ‘last will’ and Gibbons points out that his own will contains the phrase ‘I give, devise and bequeath’ (p. 26). Items such as these are clearly open to reform.

Conclusions.

Forensic linguistics then is a field of research and practice which covers much ground. The legal and judicial systems depend upon language, and experts in language can usefully apply their methods and insights to assist, criticize and attempt reforms. In addition to this we have seen some of the areas in which language experts can provide evidence to the courts. Some of the topics of interest to forensic linguists overlap with or have parallels with forensic psychology. Psychologists, for example, may be interested in individuals who are excluded from full participation in the legal system because they are in some way psychologically vulnerable. Linguists, for their part, can become involved in cases where an individual may be linguistically vulnerable. Psychologists too are interested in courtroom processes and relationships and can study courtroom language in pursuing these interests, and in this field there is certainly room for psychologists and linguists to collaborate. Some psychologists, for example, are interested in the processes of legal decision-making but appear to pay little attention to how decision-making processes may have changed over the history of the law in civil society. Different types of decision- making might be identified through historic studies of the changing legal frameworks and this could lead to greater understanding of what occurs today and how it might be improved. On the other hand there is very little linguistic work on offenders. A few studies have examined sex offenders’ narratives of their offences and there are general studies of prisoner language but these have yet to find applications. As both disciplines move forward there is likely to be a degree of convergence in some of these areas, but the distinctions and differing interests can provide richness and perspective in a shared field of study.