

The preponderance of the WHAT?

Legalese, meet Linguistics

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MASSBAR
ASSOCIATION

**Plain English Jury
Instruction Task Force**

- *Failure of recollection is common.
Innocent misrecollection is not uncommon.*
- *People often forget things or make mistakes
in what they remember.*

California Book of Approved Jury Instructions (BAJI), 2.21.

Judicial Council of California Civil Jury Instruction (CACI, 2003)

Prior Research

- Charrow & Charrow, (1979)
Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions, 79 Columbia Law Review 1306.
- Elwork, Sales & Alfini, (1982)
Making Jury Instructions Understandable.
- Reifman, Gusick & Ellsworth, (1992)
Real Jurors' Understanding of the Law in Real Cases,
16:5 Law and Human Behavior 539.
- Saxton, (1998)
How Well Do Jurors Understand Jury Instructions?
A Field Test Using Real Juries and Real Trials in Wyoming,
33 Land and Water Law Review 59.

The movement to revise jury instructions

1997:

California started revising its jury instructions

BUT the movement has faced **barriers**

- inertia
- jury instructions are “sacred texts”
- jury instructions should inspire awe & respect for the court
- the empirical studies were wrong
- revising the instructions won't get jurors to listen anyway
- past decisions will be challenged

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- revising the instructions won't get jurors to listen anyway
- past decisions will be challenged
- **there's really no problem with them**



A Preview

I. Are jurors confused? If so, Why?

- Linguistic factors: legalese & syntax
- Courtroom procedures

II. Experimental evidence

- Current instructions v. "Plain English"
- Listening only v. Reading along

III. A new subject pool

I. Are jurors confused? If so, Why?

Linguistic Issues: legalese & syntax
Courtroom Procedures

Standard of Proof



Linguistic factors: **Legalese**

In one study of jurors who had served on a trial:

more than 25% couldn't define

admissible evidence

impeach

burden of proof

inference

more than 50% thought

a preponderance of the evidence

meant either

“a slow, careful, pondering of the evidence”

or

“looking at the exhibits in the jury room”

From Tiersma (1993). See also Diamond & Levi (1996); Diamond (2003); Tiersma (1999, 2001, 2009).
Marder, N.S. (2006). *Bringing Jury Instructions Into the 21st Century*, Notre Dame L. Rev. 81:449-512.

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Legalese?

Not really.

So what's the problem?

Linguistic factors: **Syntax**

- Negatives
- Nominals

Negatives

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Standard of Proof

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By contrast, in a civil case such as this one, the plaintiff is not required to prove (his/her) case beyond a reasonable doubt. In a civil case, the party bearing the burden of proof meets the burden when (he/she) shows it to be true by a preponderance of the evidence.

The standard of a preponderance of the evidence means the greater weight of the evidence. A preponderance of the evidence is such evidence which, when considered and compared with any opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more probably true than not true.

A proposition is proved by a preponderance of the evidence if, after you have weighed the evidence, that proposition is made to appear more likely or probable in the sense that there exists in your minds an actual belief in the truth of that proposition derived from the evidence, notwithstanding any doubts that may still linger in your minds.

Simply stated, a matter has been proved by a preponderance of the evidence if you determine, after you have weighed all of the evidence that that matter is more probably true than not true.

Standard of Proof

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Nominals

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failure

recollection

misrecollection

proof

belief

weight

doubt

Verbs

fail

recollect

misrecollect

prove

believe

weigh

doubt

Standard of Proof

Syntax

- Negatives
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- Passives

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Passives

Active: **[The jury]** must consider **[all of the evidence]**.

Passive: **[All of the evidence]** must **be considered**
by [the jury].

Standard of Proof

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- Negatives
- Nominals
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Standard of Proof

Syntax

- Negatives
- Nominals
- Passives
- Interjected phrases

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Simply stated, a matter has been proved by a preponderance of the evidence if you determine, **after you have weighed all of the evidence**, that that matter is more probably true than not true.

Interjected phrases

The jurors must agree on a decision.

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Interjected phrases

The jurors must agree on a decision.

The jurors, **after having considered all of the evidence**, must agree on a decision.

Standard of Proof

Syntax

- Negatives
- Nominals
- Passives
- Interjected phrases
- Multiple embeddings

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The standard of a preponderance of the evidence means the greater weight of the evidence. **[A preponderance of the evidence is such evidence [which, [when considered and compared with any opposed to it], has more convincing force and produces in your minds a belief [that what is sought [to be proved] is more probably true than not true.]]] [4 clauses deep]**

[A proposition is proved by a preponderance of the evidence [if, [after you have weighed the evidence], that proposition is made [to appear more likely or probable in the sense [that there exists in your minds an actual belief in the truth of that proposition derived from the evidence, notwithstanding any doubts [that may still linger in your minds.]]]]] [5 clauses deep]

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(Klare 1973)

Standard of Proof

Syntax

- Negatives
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[A proposition is proved by a preponderance of the evidence **if, [after you have weighed the evidence], **that proposition is made [to appear more likely or probable in the sense [that there exists in your minds an actual belief in the truth of that proposition derived from the evidence, notwithstanding any doubts [that may still linger in your minds.]]]]]]****

[5 clauses deep]

Embeddings

0 embeddings

The jury must consider all of the evidence during its deliberations.

1 embedding

The jury must consider all of the evidence [that the plaintiff presents] during its deliberations.

2 embeddings

The jury must consider all of the evidence [that the plaintiff [who is bringing the case] presents] during its deliberations.

Standard of Proof

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*civil v. criminal case
plaintiff
beyond a reasonable doubt
party, bearing, burden, meets*

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- **Words defined too late**
preponderance of the evidence

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Review

Syntax

- Negatives
- Nominals
- Passive verbs
- Interjected phrases
- Multiple Embeddings

Legalese

- Low-frequency words
- Undefined words
- Words defined too late

Standard of Proof: Plain English

This is a civil case. In a civil case, there are two parties, the “plaintiff”, and the “defendant”. The plaintiff is the one who brings the case against the defendant. And it is the plaintiff who must convince you of his case with stronger, more believable evidence. In other words, it is the plaintiff who bears the “burden of proof”.

After you hear all the evidence on both sides, if you find that the greater weight of the evidence -- also called “the preponderance of the evidence” -- is on the plaintiff’s side, then you should decide in favor of the plaintiff.

But if you find that the evidence is stronger on the defendant's side, or the evidence on the two sides is equal, 50/50, then you must decide in favor of the defendant.

Now, you may have heard that in some cases, the evidence must convince you “beyond a reasonable doubt”. That’s only true for criminal cases.

For civil cases like this one, you might still have some **doubts** after hearing the evidence, but even if you do, as long as one side's evidence is stronger -- even slightly stronger -- than the other's, you must decide in favor of that side.

Stronger evidence does **not** mean more evidence. It is the quality or strength of the evidence, **not** the quantity or amount, that matters.

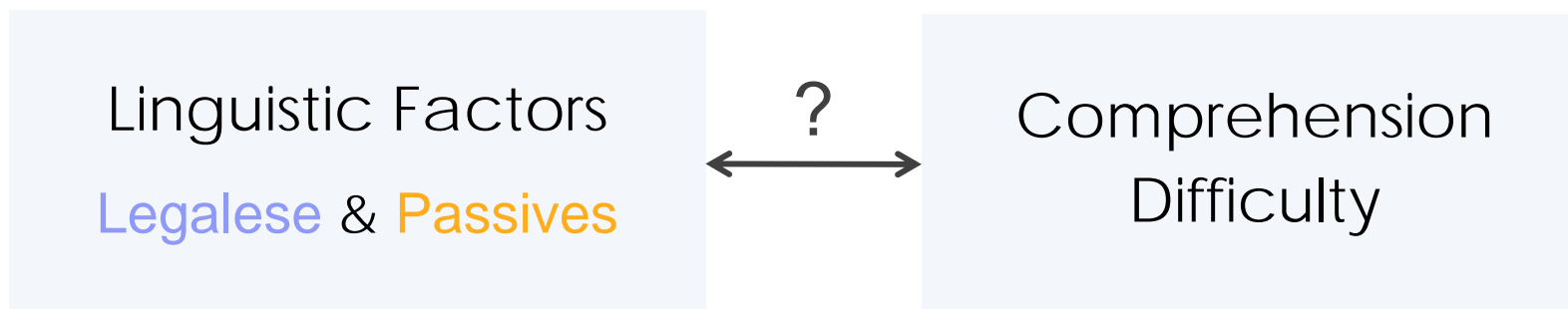
II. Experimental Evidence

II. Experimental Evidence

Current Instructions v. **Plain English**

Listening only v. **Reading Along**

Hypothesis: Linguistic factors



A comprehension test:

- 43 undergraduate students
- Listened to 6 current Massachusetts jury instructions
- Answered T/F questions after each

Standard of Proof

Current

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Simply stated, a matter **has been proved** by a **preponderance of the evidence** if you determine, after you have weighed all of the evidence, that that matter is more probably true than not true.

Plain English

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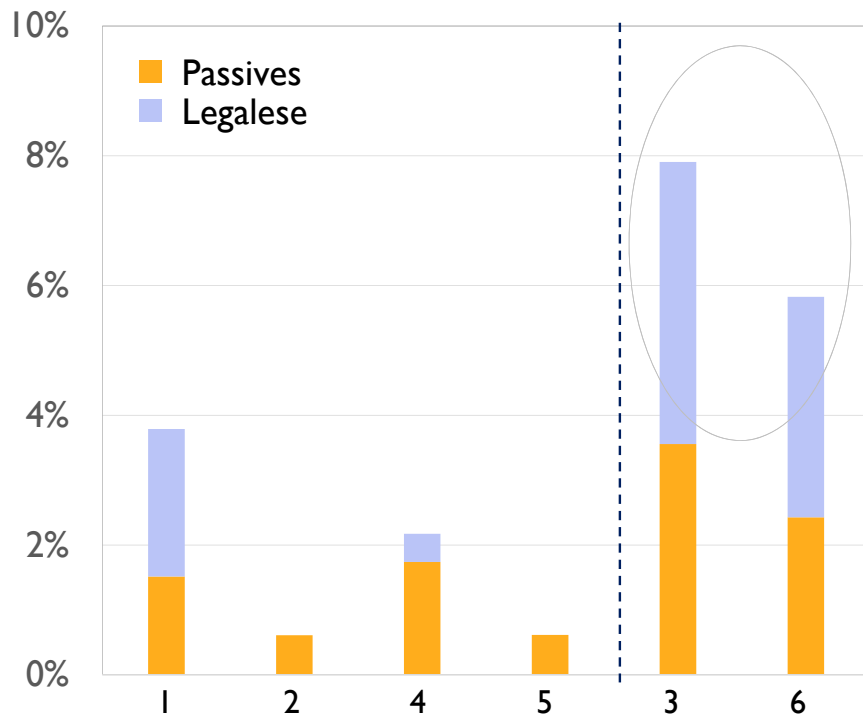
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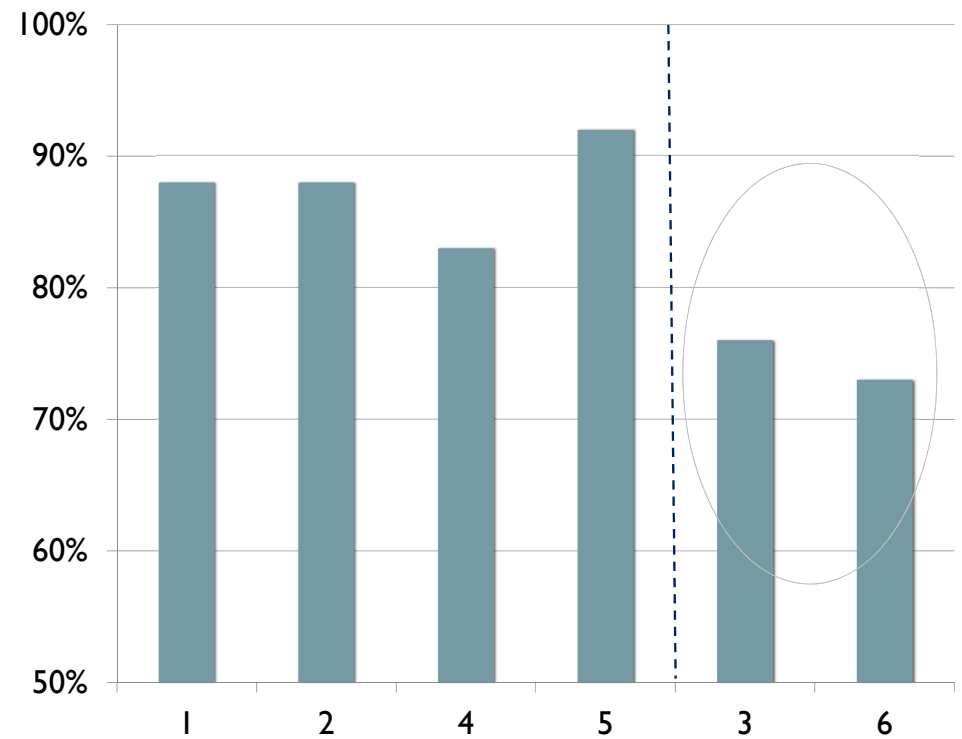
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Results: Linguistic factors & comprehension

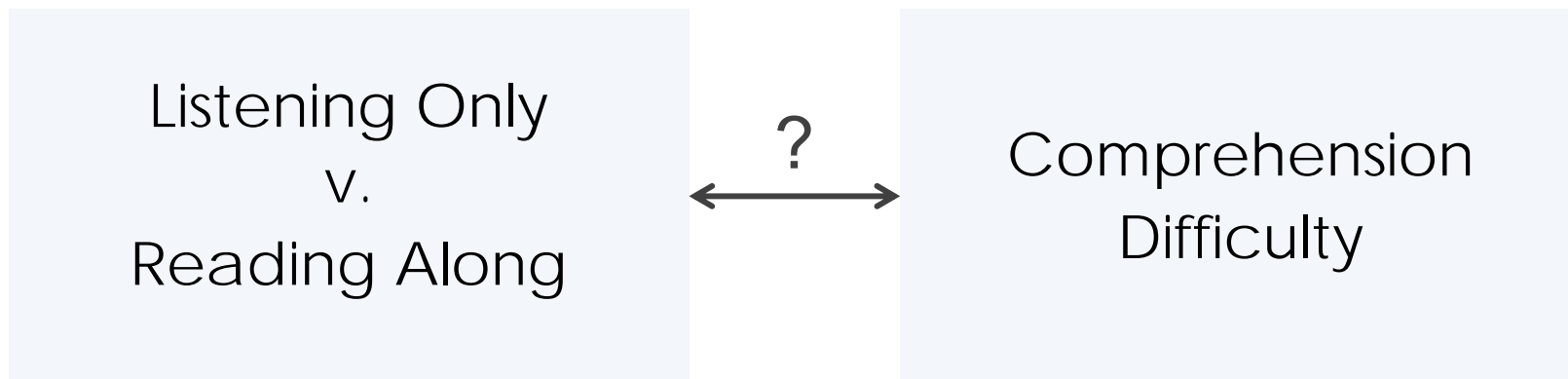
Rates of Linguistic Factors



Rates of Comprehension



Hypothesis 2: Listening only v. Reading along



Marder, N.S. (2006). *Bringing Jury Instructions Into the 21st Century*, Notre Dame L. Rev. 81:449-512.

Chang, Anna C. (2009). *Gains to L2 listeners from reading while listening vs. listening only in comprehending short stories*. Applied English Department, Hsing-Wu College.

Method & Design

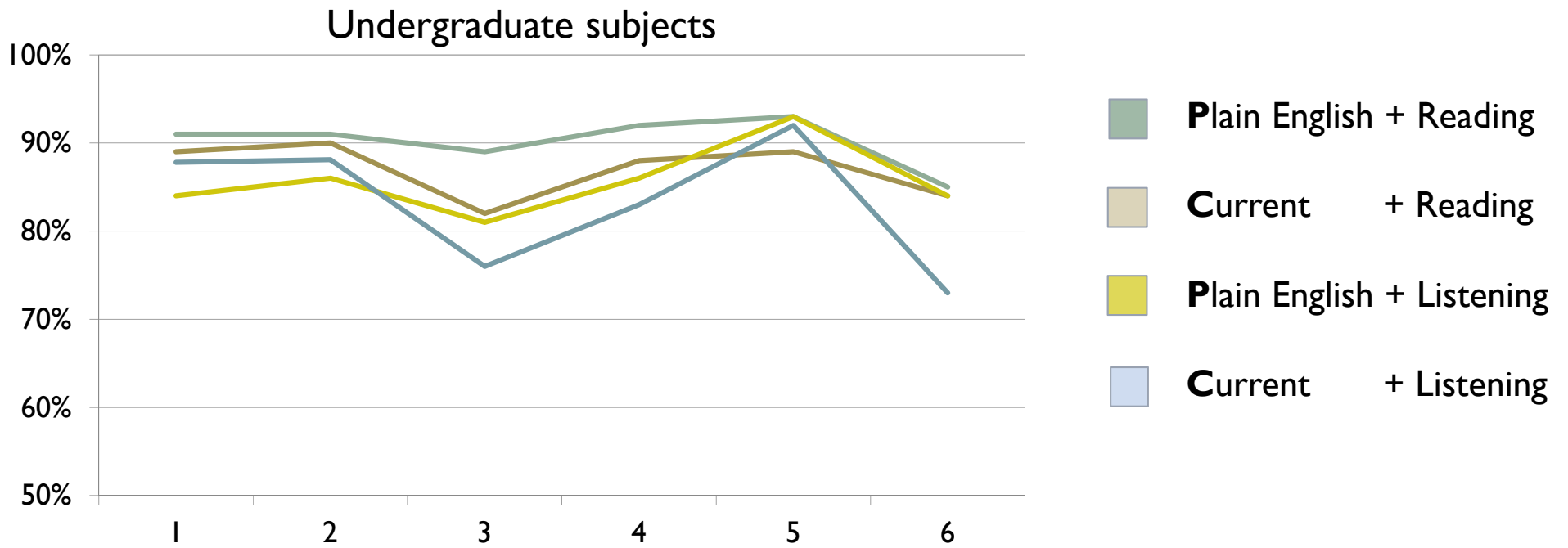
	Current	Plain English
Listening Only	✓	?
Reading +Listening	?	?

Method & Design

214 undergraduates

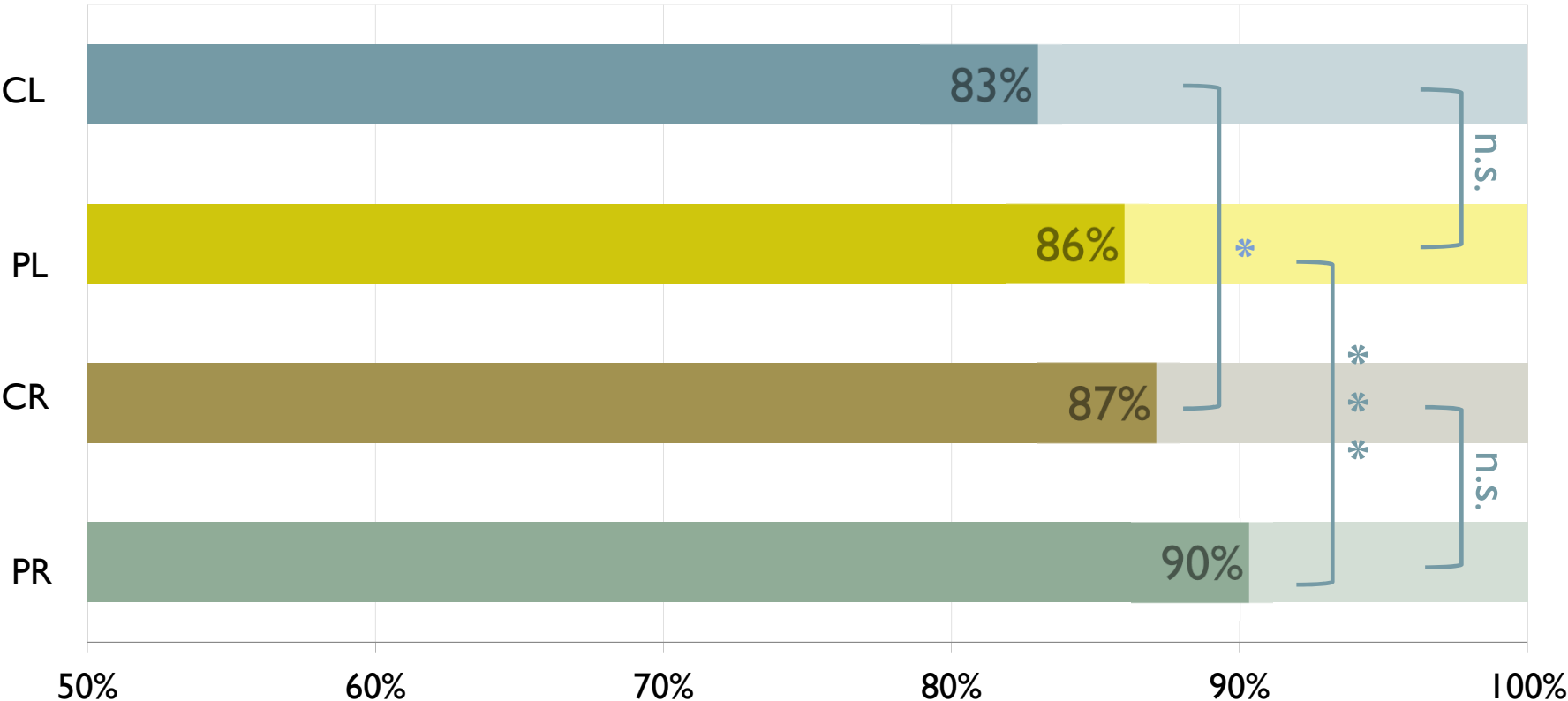
	Current	Plain English
Listening Only	43	86
Reading +Listening	36	49

Results



Results

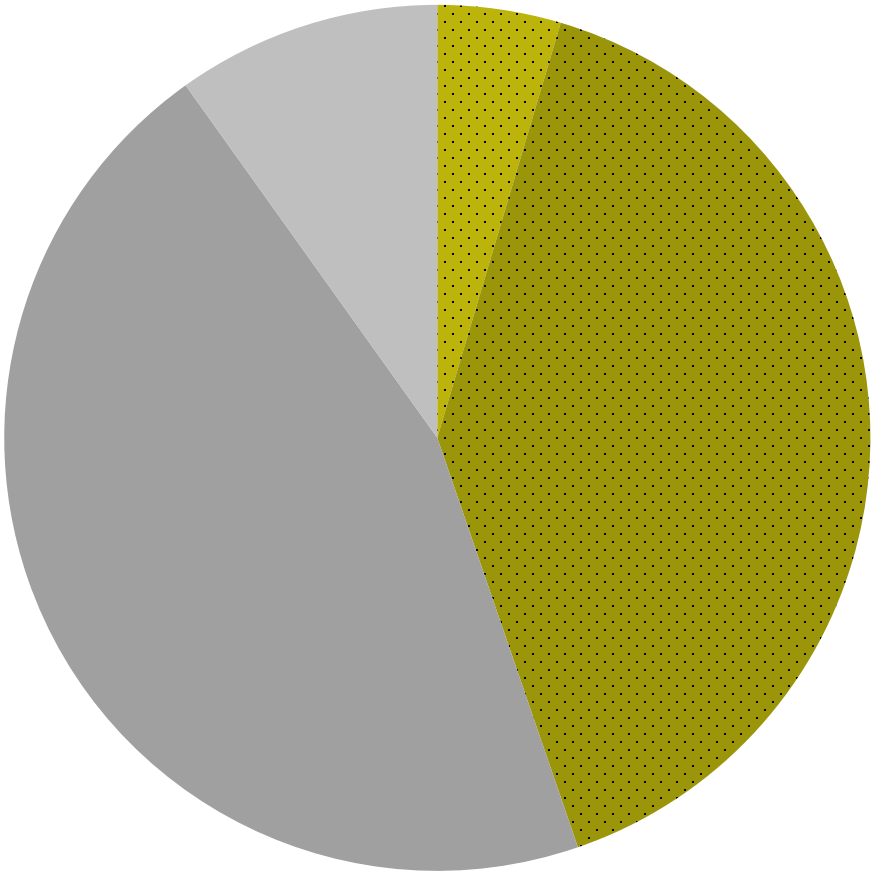
Overall Comprehension Rates





Consider this:

Education Levels in Massachusetts



2013 U.S. Census Data

- K - 8th Grade
- High School
- College
- Graduate School

III. A New Subject Pool



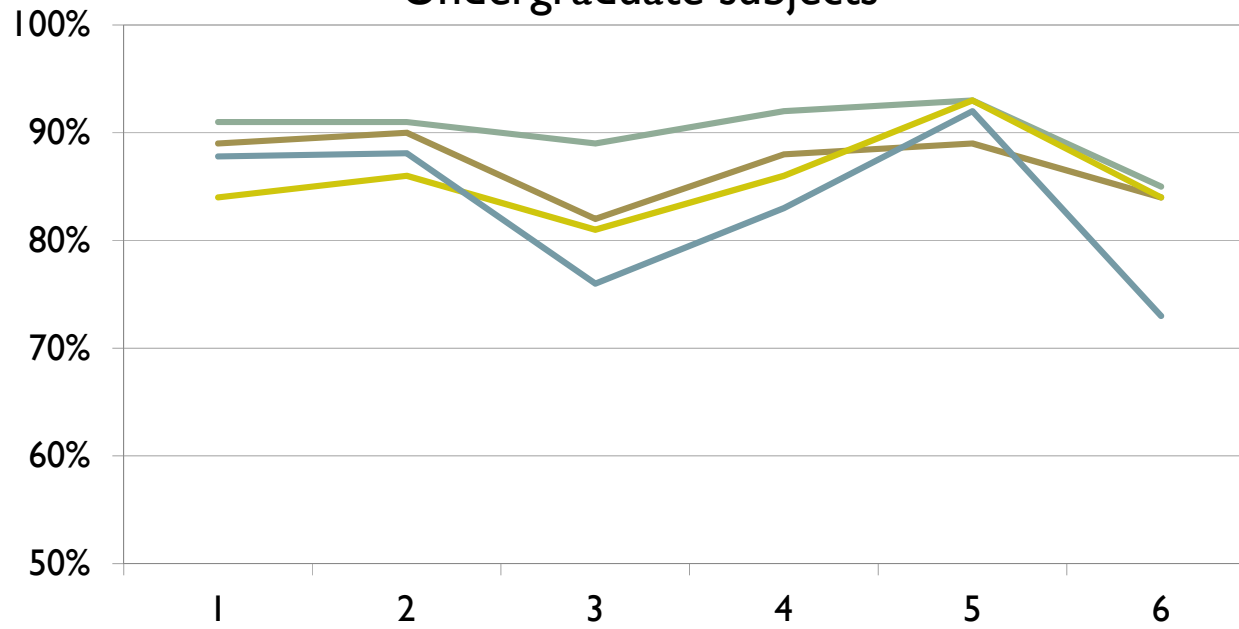
Methods & Design

389 MTurk subjects

	Current	Plain English
Listening Only	125	99
Reading +Listening	66	99

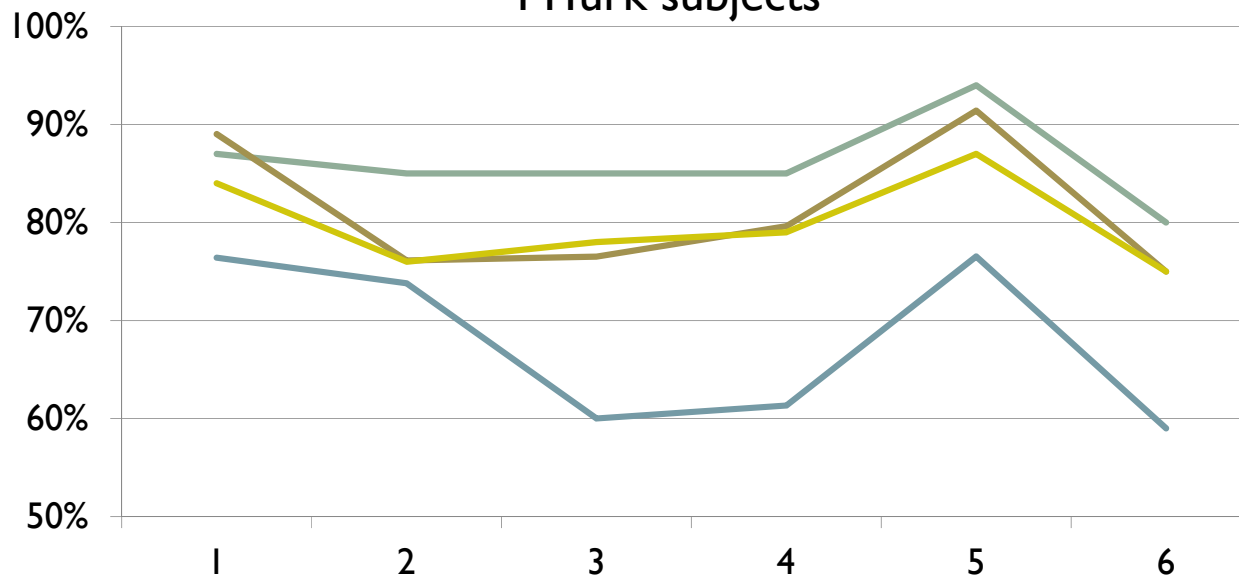
Results

Undergraduate subjects



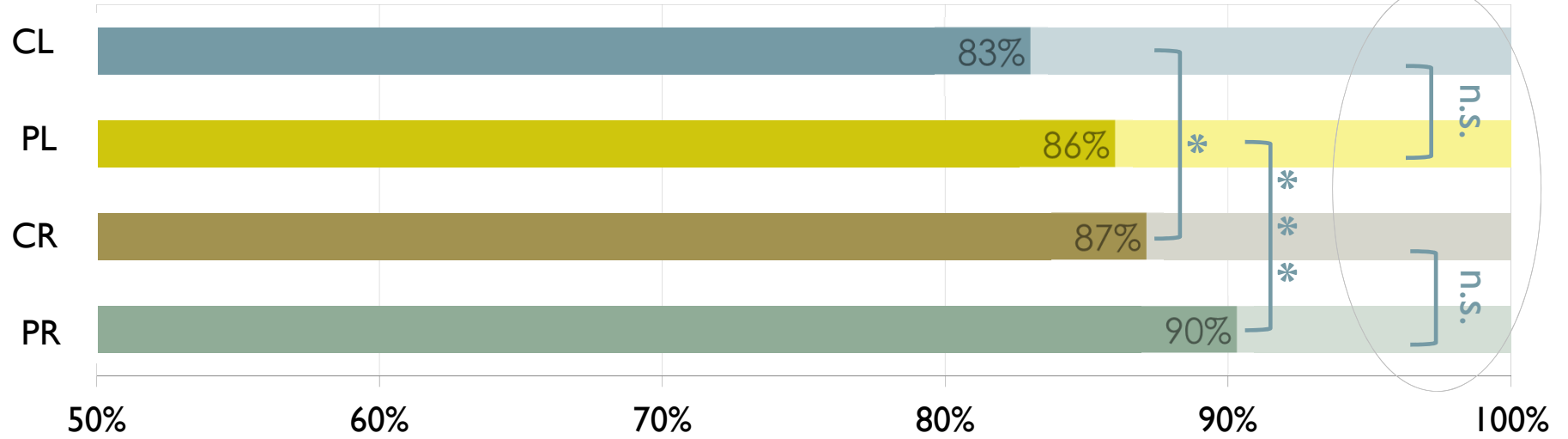
- Plain English + Reading
- Current + Reading
- Plain English + Listening
- Current + Listening

MTurk subjects

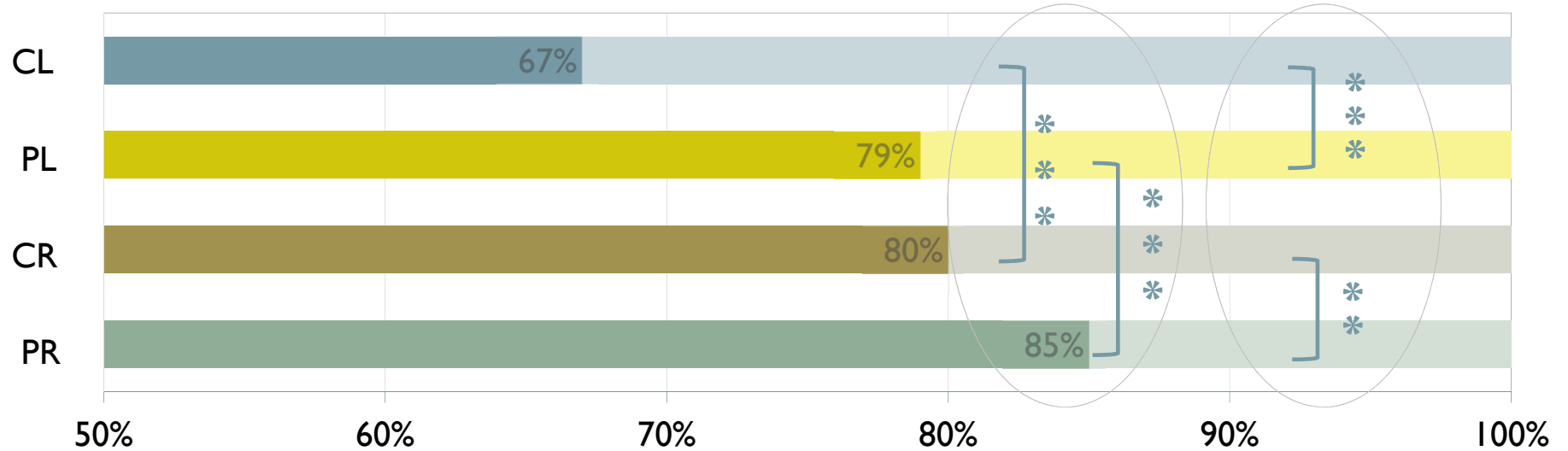


Comprehension Rates




Undergraduates



MTurk Subjects



Hypotheses

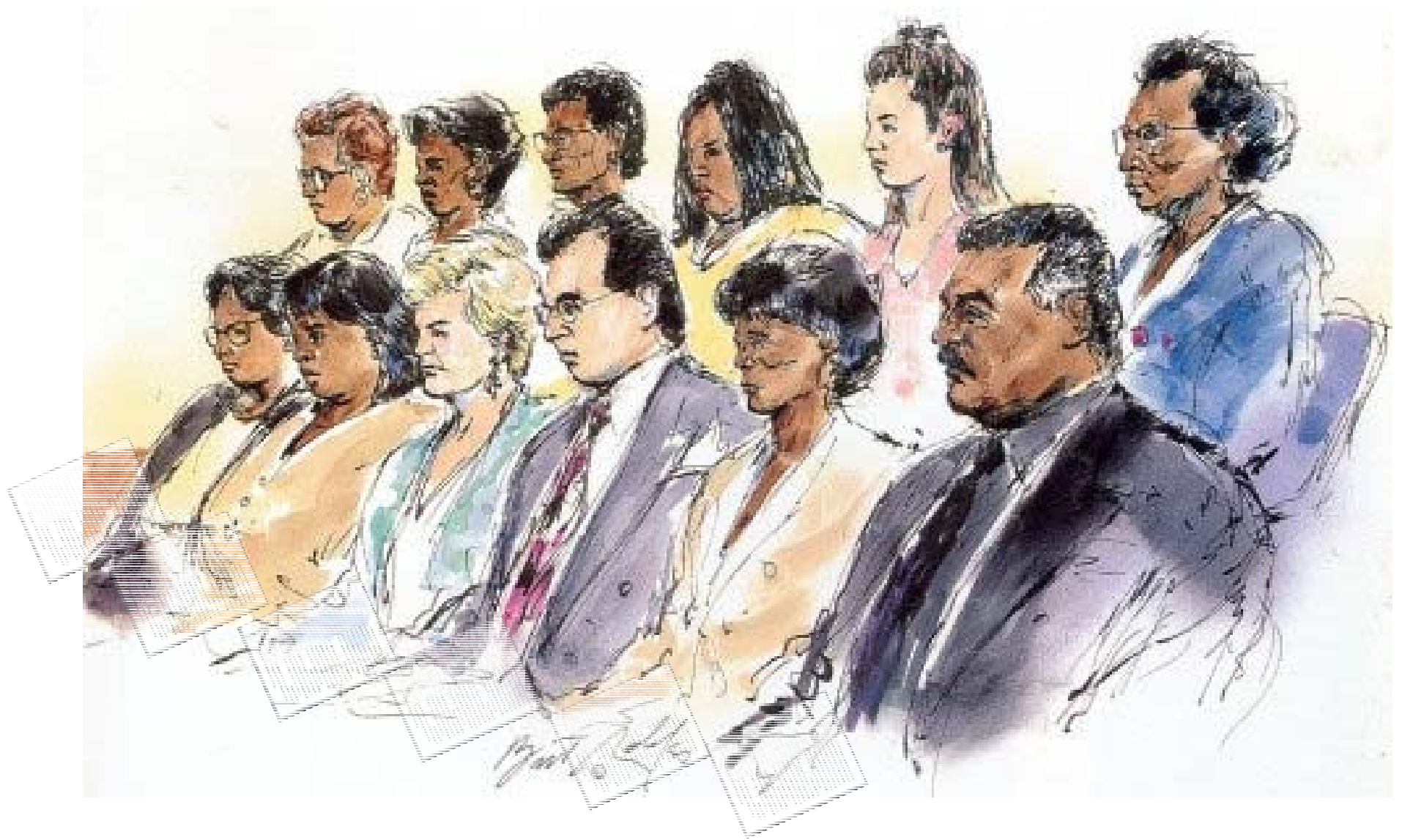
- **Plain English** instructions significantly improve comprehension over Current instructions 
- **Reading along** significantly improves comprehension over Listening only 
- **MTurk subjects** showed worse performance and greater, significant, improvements compared with undergraduates 

Take-Aways

To improve comprehension,
pay attention to **linguistic factors**

- less **Legalese**
 - fewer **Passives**
- }] **'Plain English'**

In addition,



Take-Aways

To improve comprehension,

Pay attention to **linguistic factors**

- less **Legalese**
 - fewer **Passives**
- } 'Plain English'

And,

- Give jurors a copy to **read along**

The End

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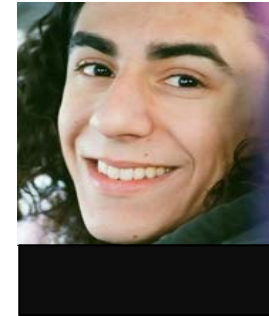
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Questions?

Comments?